TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. [redacted]61.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, AND C. AUGUST SPRECKELS, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF J. D. SPRECKELS' BROS., AND A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, AND Mrs. JOHN UTTERSTRON, PLAINTIFFS IN ERROR,

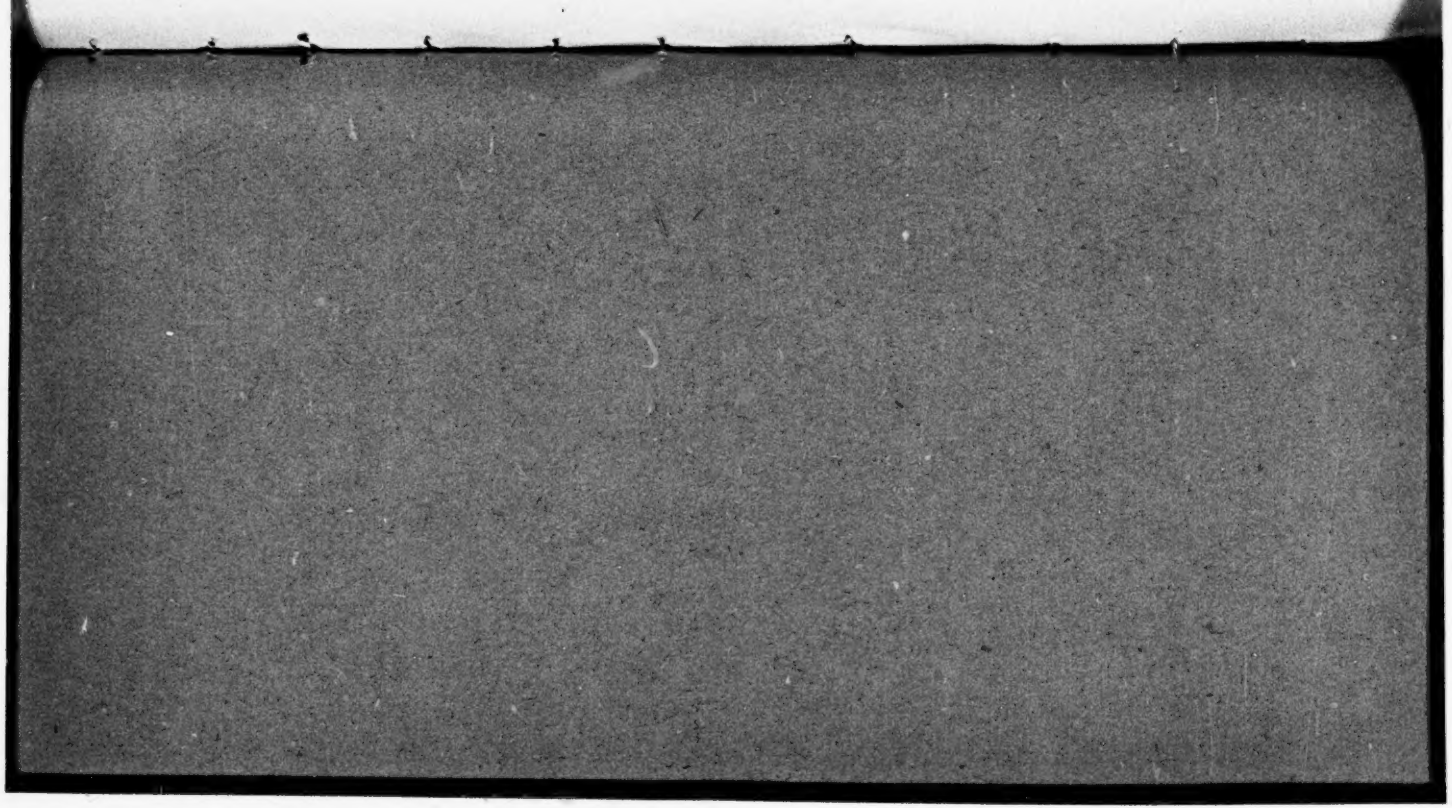
vs.

CHARLES A. BROWN.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED APRIL 18, 1907.

(20,668.)



(20,668.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 281.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, AND C. AUGUST SPRECKELS, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF J. D. SPRECKELS' BROS., AND A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, AND MRS. JOHN UTTERSTRON, PLAINTIFFS IN ERROR,

vs.

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INDEX.

	Original.	Print.
Præcipe for transcript	1	1
Proceedings in circuit court	5	3
Plaintiff's complaint	5	3
Schedule A—Description of accretions	7	4
Schedule B—Description of accretions	8	5
Plaintiff's requests for instructions	10	5
Defendants' requests for instructions	17	10
Verdict	26	17
Motion for judgment *non obstante veredicto*	27	17
Motion for a new trial	29	19
Affidavit of William A. Kinney	31	20
Sidney M. Ballou	41	27
Frank C. Atherton	48	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 30, 1907.

	Original.	Print.
Affidavit of George E. Sabin	50	32
Counter-affidavit of J. A[illegible] Magoon	55	34
J. [illegible]utfoot	59	37
Charles A. Brown	65	40
Affidavit of H. P. Benson	66	41
James E. Jaeger	67	41
Thomas W. Chase	68	42
P. Lishman	69	43
Wm. Buckle	70	43
H. W. Doane	71	44
G. H. Cowan	72	45
G. G. Fuller	73	45
Charles H. Pfeiffer	74	46
A. M. Mellis	75	47
John T. Mitchell	76	47
F. C. Atherton	77	48
Reply affidavit of William A. Kinney on motion for a new trial	79	49
Reply affidavit of Sidney M. Ballou on motion for a new trial	86	53
Oral opinion of circuit judge J. T. De Bolt on motion for a new trial	89	54
Judgment	103	63
Clerk's minutes of trial	106	64
Plaintiff's Exhibit "A"—Deed of Kamehameha III to Elizabeth G. I. Bates, dated September 19, 1853, recorded in Liber 5, page 587	129	79
"B"—Deed of Elizabeth G. I. Bates *et al.* to Ben Pitman, dated July 3, 1858, recorded in Liber 10, pages 554–'5	131	80
"C"—Deed of Martha B. Pitman to Charles A. Brown, dated August 2, 1899	133	81
"D"—Land commission award No. 4894 to Kalaeloa and translation	137	84
"E"—Royal patent No. 1144 to Kalaeloa and translation	142	86
"I"—Admissions, dated February 14, 1906	149	90
"Q"—Lease, dated November 1, 1879, between Thomas Spencer and Obadiah B. Spencer	150	91
"Y"—Patent grant No. 3739, dated March 7, 1895	153	92
Defendants' Exhibit "1"—Certified copy of power of attorney by Ben Pitman and wife to H. Hackfeld & Co	157	95
Defendants' Exhibit "5"—Certified copy of decree of foreclosure in the case of J. S. McGrew *vs.* Thos. Spencer, equity division, No. 275	161	97
Petition for writ of error to supreme court of Territory of Hawaii	170	102
Assignment of errors in supreme court of Territory of Hawaii	173	104
Writ of error to circuit court of Territory of Hawaii	177	107
Opinion of supreme court of Territory of Hawaii, rendered August 29, 1902	179	108

	Original.	Print.
Opinion of supreme court of Territory of Hawaii, rendered November 15, 1906	194	116
Order for transmission of original exhibits	223	135
Clerk's certificate to transcript	225	136
Clerk's certificate to papers on writ of error	226	136
Writ of error	228	137
Citation	232	139
Admission of service	235	140
Order extending time to file record	237	140
Judgment	239	141
Petition for writ of error, &c	242	143
Order allowing writ of error, &c	244	144
Affidavit of value	246	145
Bond on writ of error	249	147
Assignment of errors	251	148

1 In the Supreme Court of the Territory of Hawaii.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Præcipe Designating Parts of Record to be Included in Transcript.

To Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii:

You are hereby requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the cause entitled in said Court "Charles A. Brown, *vs.* John D. Spreckels, Adolph B. Spreckels and C. August Spreckels partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron" and to include in such transcript of record the following and no other papers and exhibits, to wit:

1. Plaintiff's Complaint and Schedules "A" and "B,"
2. Plaintiff's Requests for Instructions,
3. Defendants' Requests for Instructions,
4. Verdict,
5. Motion for judgment *non obstante veredicto*,

2 6. Motion for a New Trial attached thereto are the Affidavits of William A. Kinney, Sidney M. Ballou and Frank C. Atherton;

7. Affidavit of George E. Sabin.

8. Counter Affidavits of J. Alfred Magoon, J. Lightfoot and Charles A. Brown,

9. Affidavits of H. P. Benson, James E. Jaeger, Thos. W. Chase, P. Lishman, William Buckle, H. W. Doane, George H. Cowan, George G. Fuller, Charles H. Pfeifer, A. M. Mellis, John T. Mitchell and Frank C. Atherton,

10. Reply Affidavit of William A. Kinney on Motion for a New Trial,

11. Reply Affidavit of Sidney M. Ballou on Motion for a New Trial,

12. Oral opinion of Circuit Judge J. T. De Bolt on Motion for a New Trial,

13. Judgment of the Circuit Court,

14. Clerk's Minutes Circuit Court,

15. Plaintiff's Exhibit "A:" Deed of Kamehameha III to Elizabeth G. I. Bates, dated Sept. 19, 1853, recorded in Liber 5, page 587,

16. Plaintiff's Exhibit "B." Deed of Elizabeth G. I. Bates, *et alt.* to Ben Pitman, dated July 3, 1858, recorded in Liber *Liber* 10, pages 554-5,

17. Plaintiff's Exhibit "C." Deed of Martha B. Pitman to Charles A. Brown, dated August 2, 1899,

18. Plaintiff's Exhibit "D." Land Commission Award Number 4894 to Kalaeloa and translation,

19. Plaintiff's Exhibit "E," Royal Patent Number 1144 to Kalaeloa and translation,

20. Plaintiff's Exhibit "I," Admissions dated February 14, 1906,

21. Plaintiff's Exhibit "Q," Lease dated November 1, 1879, between Thomas Spencer and Obadiah B. Spencer,

22. Plaintiff's Exhibit "Y," Patent Grant Number 3739, dated March 7, 1895,

23. Defendants' Exhibit "1," certified copy of Power of Attorney by Ben Pitman and wife to Hackfeld & Co.,

24. Defendants' Exhibit "5," Certified copy of Decree of Foreclosure in the case of J. S. McGrew *vs.* Thos. Spencer Equity Division Number 275,

25. Petition for Writ of Error, Supreme Court, Territory of Hawaii,

26. Assignment of Errors, Supreme Court, Territory of Hawaii,

27. Writ of Error, Supreme Court, Territory of Hawaii,

28. Opinion Supreme Court, Territory of Hawaii, rendered August 29, 1902,

29. Opinion Supreme Court, Territory of Hawaii, rendered November 15, 1906,

30. Order for transmission of Original Exhibits.

And you are further requested to transmit as part of the record the following original exhibits,

31. Plaintiff's Exhibit "G," Copy of portion of Government Registered Map Number 1061,

32. Plaintiff's Exhibit "H," Copy of portion of Government Registered Map Number 1062,

3 33. Plaintiff's Exhibit "I," Copy of portion of Government Registered Map Number 1561,

34. Plaintiff's Exhibit "J," Copy of portion of Government Registered Map Number 2210,

35. Plaintiff's Exhibit "K," Copy of portion of Government Registered Map Number 1719,

36. Plaintiff's Exhibit "L," Photograph of Water Front, Hilo,

37. Plaintiff's Exhibit "M," Photograph of Water Front, Hilo,

38. Plaintiff's Exhibit "N," Photograph of Water Front, Hilo,

39. Plaintiff's Exhibit "O," Photograph of Buildings, Hilo, and

40. Plaintiff's Exhibit "R," Photograph of Water Front, Hilo, 1875.

Respectfully,

SIDNEY M. BALLOU,
Attorneys for Plaintiffs in Error.

Dated, Honolulu, March 29, 1907.

4 [Endorsed:] Supreme Court Territory of Hawaii. John D. Spreckels, Adolph B. Spreckels and C. August Spreckels partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. *P*ohn Utterstron, Plaintiffs in Error, *vs.* Charles A. Brown, Defendant in Error. Præcipe Designating Parts of Record to be Included in Transcript. Filed March 30, 1907, at 11:30 o'clock A. M. J. A. Thompson, Clerk Supreme Court of the Territory of Hawaii.

5 Bates Piece.

Admitted as correct to be substituted for missing original.

(Signed) HOLMES & STANLEY,
MAGOON & LIGHTFOOT,
Att'ys for Plaintiff.

(Signed) KINNEY, McC. & COOPER,
BALLOU & MARX.

Copy.

In the Circuit Court of the Fourth Judicial Circuit, Island of Hawaii, Hawaiian Islands.

CHARLES A. BROWN, Plaintiff,
vs.
JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTROM, Defendants.

Ejectment.

(Stamped.)

Plaintiff's Complaint.

To the Honorable G. K. Wilder, Judge of the Circuit Court of the Fourth Circuit:

The undersigned, Charles A. Brown, Plaintiff, complains of John D. Spreckels, Adolph B. Spreckels and C. August Spreckels, partners, residing in San Francisco, United States of America and doing business in the Hawaiian Islands under the firm name and style of J. D. Spreckels Brothers, and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstrom, all residing in Hilo, Island of Hawaii, Hawaiian Islands, defendants that they have unjustly and contrary to law and the rights of

plaintiff, taken into their possession and converted to their
6 use and occupation all those pieces or parcels of land situate in Hilo aforesaid described in Schedules A and B hereto attached and made a part hereof, and to which reference is hereby made, which the plaintiff claims in fee simple by purchase.

Wherefore, plaintiff asks the process of this Court to cite said defendants to appear and answer this complaint before a jury of the Country at the January term of this Court A. D. 1900 unless sooner disposed of by Judicial authority, and that the plaintiff may have restitution of said property with costs of suit.

CHARLES A. BROWN,
By His Att'y, J. ALFRED MAGOON.

HAWAIIAN ISLANDS, *Island of Oahu, ss:*

Now comes J. Alfred Magoon for and in behalf of C. A. Brown and being sworn on oath deposes and says that he is attorney for Charles A. Brown in the above entitled action, that he knows the contents of the foregoing complaint, and that the same is true to the best of his knowledge and belief.

J. ALFRED MAGOON.

Subscribed and sworn to before me this 12th day of December, 1899.

P. D. KELLETT, JR.,
Clerk 1st Circuit Court.

J. ALFRED MAGOON,
Att'y for Plaintiff.

7 SCHEDULE "A."

Description of accretions to that certain tract of land conveyed by Kamehameha III to E. L. G. Bates by deed dated the 19th day of September, 1853, and recorded in Liber 5, page 587, with a warranty to the sea beach at low water mark, and being a portion of said accretions below the present road way called Front Street, and partly occupied by J. D. Spreckels Bros.

Notes of Survey.

Beginning at the present South Corner of Front St. Waianuenue St., the said point being the original North angle of the lot conveyed by B. Pitman to Thos. Spencer, lib. 13 folio 384, the boundary runs by the true meridian,—

1. S. 24° 48′ E. 192.0 ft. along West edge of Front St. to E. angle this piece.
2. N. 65° 12′ E. 186.0 ft. along accreted extensions to point at sea beach at low water mark, thence following around the line of said sea beach at low water mark (1899) by a curve to the left of radius of 251.5 ft. the direct bearing, length of chord being

3. N. 12° 41′ W. 232.0 ft. thence
4. S. 56° 48′ W. 238.0 ft. along line of accreted extensions on the North line of the Bates property to point of beginning.

Containing an area of 39639 Sq. feet more or less, reserving however therefrom the area now occupied as a public roadway and known as Front St.

8 SCHEDULE "B."

Description of accretions to portion of L. C. A. 1144 R. P. 4894 Kalaeloa, conveyed by B. Pitman to Thos. Spencer, Lib. 13, folio 384, and partly occupied by J. D. Spreckels Bros.

Notes of Survey.

Beginning at the North angle of lot described in deed from B. Pitman to Thos. Spencer lib. 13 folio 384, the boundary runs by the true meridians,—

1. S. 23° 25′ E. 22 ft. to West angle.
2. N. 67° 10′ E. 92 ft. to East angle of Kong Hip Chan Building
3. N. 22° 50′ W. 28 ft. to North line or accreted extension of L. C. A. 1144, this property,
4. S. 65° 20′ W. 92 — along same to point of beginning.

Containing an area of 2300 sq. feet more or less, reserving however the area now occupied as a public roadway, known as Front Street.

9 Endorsed: Copy. Circuit Court Fourth Circuit Hawaii Jan'y Term, 1900. C. A. Brown *vs.* J. D. Spreckels Bros. *et al.* Plaintiff's Complaint. Received $37. Filed Dec. 12, 1899. Sgd. Henry Smith, Clerk. J. Alfred Magoon, Att'y for Plaintiff.

10 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, 1906.

C. A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Instructions Requested by Plaintiff.

GENTLEMEN OF THE JURY:

1.

This is an action in ejectment wherein the plaintiff seeks to recover from the defendants, possession of two pieces of land situate on the waterfront of Hilo, Island and County of Hawaii. One of these

Given. J. T. D.

pieces is known as part of the Bates land and is described in Schedule A attached to plaintiff's complaint. The other is known as part of the Kalaeloa land and is described in Schedule B attached to plaintiff's complaint.

2.

Given. J. T. D.

I instruct you that the words "also the sea beach in front of the same down to low water mark" used in the deed of Kamehameha III to Elizabeth J. I. Bates, covers the land described in Exhibit A.

3.

Given. J. T. D.

I instruct you that the words "with the right of extension to low water mark" used in the deed from Kalaeloa to Pitman together with the other particular descriptions contained in said deed covers the land described in Schedule B.

11

4.

Given. J. T. D.

I charge you that those portions of Schedules A and B in front of the Bates land and Kalaeloa land which have been formed by the extension of the land seawards are ac-retions.

5.

Given. J. T. D.

I instruct you that plaintiff has made out a complete paper title to the two pieces of land described in Schedules A and B attached to his complaint.

6.

Given as modified. J. T. D.

I charge you that the defendants in this case rely ^ upon [the defense of]* adverse possession. The burden of proving this defense for one defense is upon defendants; unless you are satisfied by a preponderance of the evidence that the defendants have clearly proven adverse possession as defined in these instructions, you will find ^ [your verdict will be for plaintiff.]* against defendants upon that point.

7.

I charge you that there are five essential elements necessary to constitute an effective adverse possession.

First. The possession must be hostile and under a claim of right.

Second. It must be actual.

Third. It must be open and notorious.

[* Words enclosed in brackets erased in copy.]

Fourth. It must be exclusive.
Fifth. It must be continuous.

If you find from the evidence that any ^one^ of these elements is wanting, you must find [for plaintiff]* against defendants on the issue of adverse possession.

Given as modified. J. T. D.

12

8.

I charge you that the intention with which possession is taken and held, is regarded as a controlling factor in determining whether or not it is adverse. Unless you find therefore that the defendants or those from whom they claim title ^or Thos. Spencer,^ entered upon the lands in question with the intention of ousting the true owner and holding the same by adverse possession as defined in these instructions, [your verdict will be for plaintiff]* you must find against defendants on the issue of adverse possession.

[If you find that the defendants have not been in hostile possession of the lands in dispute for the full statutory period of twenty years. you must find for plaintiff.]*

Given as modified.

9.

I have charged you that the occupation must be actual. The mere claim of ownership does not constitute actual possession. The occupation must be real. It matters not how often Spencer might have said that he was the owner of that land or he was the alii of that land such declarations [above]* could never amount to adverse possession in him, but such declarations may be considered by you in connection with other alleged acts of adverse possession.

^alone^

Given as modified.

10.

I instruct you that it does not effect Pitman's rights that he did not object to anything that Thomas Spencer did on the property in dispute. Mere silence on the part of Pitman could never enable Spencer to claim title by adverse possession.

Refused. J. T. D.

13

11.

I have instructed you that the adverse possession must be continuous, by this it is meant that the defendants must have actually ^used or^ occupied the lands in an adverse manner uninterruptedly for the full statutory period of twenty years. If you find that there was a break in the hostile possession for any period of time, ^during the statutory period^ however

Given as modified. J. T. D/.

[* Words enclosed in brackets erased in copy.]

short, you[r verdict must be for plaintiff]* must find against defendants on the issue of adverse possession.

12.

When the actual possession of land by an adverse claimant before the full statutory period has run ceases, ^ the constructive possession of the legal owner revives and a renewed adverse possession will not be added to the former adverse possession and the latter adverse possession in order to be effectual must be for the full statutory period of twenty years.

There is in the law of adverse possession what is known as tacking, that is where one in adverse possession of lands conveys or transfers his interests to another. In such a case, the possession of the grantee is added to the possession of the grantor and if the two periods taken together make up the twenty years, a [title]* of adverse possession is acquired. [I charge you in this case,]* this doctrine of tacking does not apply and you must disregard it for there is no evidence of any conveyance or transfer from Spencer to Macfarlane or from Macfarlane to the defendants of any right which Spencer might have acquired in the lands in dispute.

Given as modified. J. T. D.

title

I charge you in this case

13.

The claiming of the land in dispute by Spencer and the occasional use of it by him would never ripen into title by adverse possession. In order to enable Spencer to have title by adverse possession, it was necessary that his occupation should have been such that Pitman was presumed to know independently of what Spencer said that he was in possession of the land adverse to Pitman's title. In other words, Spencer's possession must have been open and notorious so as to raise a presumption that Pitman knew independently of what Spencer said that he was claiming the land in adverse possession. It is not sufficient that the alleged acts of adverse possession of Spencer showed a claim of adverse possession to a few persons in Hilo. They must have been such as to show to any person in that locality that he was claiming the same adversely and unless you so find, your verdict must be for plaintiff.

14

Refused. J. T. D.

14.

I have charged you that the possession must be exclusive which means that it must not be exercised in common with the public generally. It is immaterial whether the public generally or any individual did not perform every act that Spencer performed upon the property in dispute, so long as the general character of all the acts was the same. [There is no difference as to the law governing

[* Words enclosed in brackets erased in copy.]

occupation whether one man dried onions and the other man dried potatoes, whether one dried skins and another piled boxes, whether one dried groceries and another walked over the premises as a roadway, whether one took sand and another took gravel, whether one put up a hitching rail and another put up a flag staff, these acts are in their general character the same and would not give one person doing one or several of such acts the right to claim by adverse possession any more than a person doing another or several other of such acts, and a fact that a man did one of these things or several of these things. Another would not give the first person the right to claim adverse possession any more than it would *five* the other.

Given as modified. J. T. D.

If you find that the space above the bank was used as a road way and if you find that after the wall was erected that that space was used as a public way, Thomas Spencer and the defendants could not claim adverse possession of any portion thereof.]*

15.

I charge you that the erection of the boat-house by Thomas Spencer referred to in the testimony did not give him a right to claim that portion covered by the boat-house by adverse possession for the reason that the boat-house did not remain there for a period sufficiently long to give title to the land on which it stood by adverse possession.

Refused. J. T. D.

16.

I charge you that the erection by Thomas Spencer of the flag-pole upon a portion of the land in dispute, did not give him title thereto by adverse possession as the flag-pole did not remain there long enough to create title by adverse possession.

Refused. J. T. D.

17.

I charge you that a mere claim to land unaccompanied by actual possession will not ripen into a title however long and persistently such claim is asserted; and therefore the mere assertion by Spencer that he owned or by the defendants that they owned the land in question, unaccompanied by actual possession of an adverse nature could never confer on him or on them a title to the land in question by adverse possession.

Refused. J. T. D.

18.

Occupation in common with the public generally is not such exclusive possession as will constitute the basis of a title by adverse possession.

Refused. J. T. D.

[* Words enclosed in brackets erased in copy.]

19.

Before you can find that Thomas Spencer had such adverse possession of the land in dispute as the law requires to constitute a prescriptive title you must be satisfied from the evidence that he had exclusive possession of the land for a continuous period of twenty years, and if you believe from the evidence that from the year 1872 (the year when he moved to the plantation) until the year 1880 he had no exclusive possession, or that from the year 1865 to 1869 the land was used in common by the public of Hilo, or that for a period of ten years or thereabouts from the year 1874 the land was so used in common and was a kind of "nobody's land," then I charge you that the possession of Thomas Spencer did not ripen into a title by prescription, and your verdict must be for the plaintiff.

Refused. J. T. D.

20.

I charge you that the burden of proof in this case is on the defendants and not on the plaintiff.

Refused. J. T. D.

Dated Honolulu, March 7, '06.

MAGOON & LIGHTFOOT AND
HOLMES & STANLEY,
Counsel for Plaintiff.

Endorsed: L. 5038. C. A. Brown *v.* J. D. Spreckels *et al.* Instructions. Plaintiffs. Filed March 8th, 1906, 2:15 P. M. Job Batchelor, Clerk.

17 In the Circuit Court of the First Circuit, April Term, 1904.

C. A. BROWN
vs.
J. D. SPRECKELS ET AL.

Ejectment.

Instructions Requested by Defendants.

Counsel for Defendants hereby request that the following instructions be given to the jury.

I.

In this action of ejectment, the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's. If the defendants show the title to any of the land sued for to be in themselves, or in some third person or in the government, in any of these cases the plaintiff cannot recover such lands.

Given. J. T. D.

II.

If you find that the defendants or those under whom they claim have had adverse possession, as hereafter
Given. J. T. D. defined, of any of the land sued for, for any twenty consecutive years between 1861 and the commencement of this action in 1899, then you must find for the defendants for such land.

III.

Thomas Spencer

If you find that [any third person, not the predecessor in title of either the plaintiff or defendants,]* held adverse possession, as hereafter defined, of any of the land sued
Given. J. T. D. for, for any twenty consecutive years between 1861 and the commencement of this action
18 in 1889, then you must find for the defendants for such land, whether Thomas Spencer was the predecessor in title of the defendants or not.

IV.

I charge you that the defendants being in possession of the premises in controversy are entitled to hold
Given. J. T. D. that possession against all the world except the true owner.

V.

Adverse possession, as used in these instructions, means open, notorious, actual, exclusive, hostile and con-
Given. J. T. D. tinuous possession under claim of right for twenty years.

VI.

Adverse possession if continuous for twenty years ripens into a perfect title, after which it is immaterial
Given. J. T. D. whether the possession be continued or not.

VII.

If you find from the evidence that Thomas Spencer and those claiming under him, or Thomas Spencer
Given. J. T. D. alone, held the land in question by adverse possession for twenty years, then it is immaterial whether thereafter there were interruptions in the possession or not.

VIII.

If you find that the use made of the land in question by others than Spencer from 1851 to 1884 was by per-
Given. J. T. D. mission of Spencer either express or implied, such use would not prevent the Statute of Limitations running in favor of Spencer.

[* Words enclosed in brackets erased in copy.]

IX.

A right of way or other easement in the public over a portion of the land in question, if any such existed,

Given J. T. D. would not be such an interruption of Spencer's possession as would prevent the

19 Statute of Limitations running in his favor, but in such a case he might acquire the fee of the land by adverse possession subject to the easement.

Parker *v.* Newberry (Tex.) 18 S. W. 815.
Webber *v.* Clark 74 Cal. 11, 18.
San Francisco *v.* Caldewood 31 Cal. 585.
New Shoreham *v.* Ball 14 R. I. 566.
Ocean Beach *v.* Yard 48 N. J. Eq. 72 at 81.

X.

You are to decide from the evidence whether the words "sea beach" in the grant from Kamehameha III to E. G. Bates are used in their strict judicial sense as conveying

Given. J. T. D. only the space between high and low water mark, or are used in a broader sense as conveying *land above* high water mark.

XI.

If you find that the words "sea beach" in the grant of the Bates premises were used as meaning the space

Given. J. T. D. between high and low water mark at the time of the grant, then you must find for the defendants for all that portion of the land sued for described in Schedule A.

XII.

If you find that the words "the sea beach in front of the same down to low water mark" in the Bates grant were intended to cover only the space between high water mark and

Given. J. T. D. low water mark, then those claiming under this title would be entitled to such space as it might exist from time to time, moving seaward as accretions gradually formed and never extending above high water mark.

Scratton *v.* Brown 4 B. & C. 485.
East Hampton *v.* Kirk 84 N. Y. at 218.
Phillips *v.* Rhodes 7 Met. 322.

20

XIII.

I instruct you that the plaintiff has shown no title to any of the land lying east of King Street, lying between

Refused. J. T. D. present high water and low water mark, and as to such land, you must find for the defendants.

XIV.

I charge you that there is no evidence that the defendants have deprived the plaintiff of the possession of any property below high water mark, and in the absence of evidence of ouster your verdict must be for the defendants for such property.

Refused. J. T. D.

XV.

While adverse possession must be continuous and unbroken this does not mean that the party claiming to hold adversely must be actually using or occupying the land all the time. It is enough if he uses the land in the way and at the times and for the purposes to which it is best adapted, or which best serve the interests of the party holding the same. [In the case of a barren sandy beach slight acts of possession would be sufficient to support a claim of adverse possession.]*

Mahukaliilii *v.* Hobron 5 Haw. 104.

Given on the point of continuity. J. T. D.

15*a*.

"A possession adversely commenced is presumed to continue adverse so long as maintained."

His Majesty Kalakaua *v.* Keaweamahi, 4 Haw. 570, 6.

Given. J. T. D.

15*b*.

Where one is shown to have been in possession of land for the period of limitation, apparently as owner, and such possession is not explained or otherwise accounted for, it will be presumed to have been adverse, although this presumption is open to rebuttal."

Kapiolani Est. *v.* Cleghorn, 14 Haw. 330, 7.

Given. J. T. D.

21

XVI.

If you find from the evidence that the plaintiff is entitled to a portion but not the whole of either Schedule A or Schedule B then you must designate in your verdict the portion for which you find for the plaintiff.

Given. J. T. D.

XVII.

If you find that any of the property sought to be recovered in this case consists of accretions to land to which the plaintiff has shown title, then the plaintiff is entitled to his proportion or share of said accretions according to the following rule.

Given. J. T. D.

[* Words enclosed in brackets erased in copy.]

The new shore line should be divided into parts proportionate to the frontage of the riparian proprietors on the ancient shore line, and division lines should then be drawn from the old division points to the new.

Johnston *v.* Jones 1 Black 209, 222.
Deerfield *v.* Ames 17 Pick. 41.
1 Enc. of Law 477.

XVIII.

If you find that adverse possession has run against the plaintiff for any land above and bounded by high
Given. J. T. D. water mark, such adverse possession would include all accretions to such land which formed during the running of the statutory period.

1 Enc. Law. 472*n*.
1 " " 824*n*.

22

XIX.

Under certain circumstances which I shall give in the following instructions, the law will permit you to presume that there was a deed, now lost, from Pitman to Spencer of
Given. J. T. D. the premises in controversy. This presumption does not depend on direct evidence that such a deed was actually made, but the presumption may be made in a proper case in the absence of such evidence.

XX.

When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and
Given. J. T. D. naturally would have been prevented by the persons interested, if it had not had a lawful origin, there is a presumption that such a right had a lawful origin, and that it was created by a proper instrument which has been lost.

120 U. S. at 552.

XXI.

The presumption of a lost deed may be properly invoked where a proprietary right had long been exercised, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during
Given. J. T. D. the period necessary to create a title by adverse possession, if in addition to the actual possession there were other open acts of ownership. If the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead.

23

XXII.

The presumption you are authorized to make of a lost deed is not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor. In such cases presumptions do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed merely for the purpose and from a principle of quieting the possession.

Given. J. T. D.

120 U. S. at 545.

XXIII.

It is not necessary in order to presume a conveyance, to believe that the conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that a conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non [existence.]* It is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long-continued possessions. It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that a grant ever issued. It would be sufficient ground for a presumption to show that, by legal possibility a grant might have issued. Though the presumption of a grant or deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, if yet [where]* no such facts are shown, and the things done and the things omitted with regard to the property in controversy by the respective parties, for long periods of time after the execution
24 of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, it is the duty of the jury to presume a conveyance, and thus quiet the possession.

Given. J. T. D.

Fletcher *v.* Fuller 120 U. S. at 547, 548, 550.

Angus *v.* Dalton, L. R. 3 Q. B. Div. 85, 112.

XXVI.

I instruct you that the deed of the Kalaeloa premises from Kalaeloa to Pitman did not convey the fee simple title to any land below the upper side of Front Street.

Refused. J. T. D.

[*Words enclosed in brackets erased in copy.]

XXIV.

Refused. J. T. D.

Unless you find that the plaintiff had some interest in or possession of some part of the premises described in the release from Martha B. Pitman to himself at the date of the delivery of said deed, such release would pass no title to the premises therein described.

XXV.

Refused. J. T. D.

I instruct you that the deed from Kamehameha III to E. G. I. Bates conveyed only the space included in the survey portion together with the land between high and low water marks in front of the same.

XXVII.

Given. J. T. D.

If you find from the evidence that the sea beach in dispute or either parcel thereof, at the time of the deed from Pitman to Spencer was so used, occupied and enjoyed in connection with the portion actually conveyed as to be necessary to its enjoyment, and that it was the intention of the grantor that it should pass as appurtenant to the portion conveyed, then it would pass as an appurtenance under the deed.

25

28.

Given. J. T. D.

The possession of an agent is the possession of his principal and therefore it is unnecessary in this case for defendants to show that the land in question was occupied solely by Thomas Spencer personally in order to make out a case of adverse possession. It is enough to show that it was occupied by his agents or servants holding possession on his behalf and by his authority.

29.

Refused. J. T. D.

I hereby direct you to return a verdict for the defendants.

30.

Refused. J. T. D.

I hereby direct you to return a verdict for the defendants the undisputed evidence showing that the premises sued for were appurtenant to the land just mauka or above Front Street conveyed by Pitman to Spencer, and therefore were covered and conveyed by the deed from Pitman to Spencer.

Respectfully submitted,

KINNEY, McCLANAHAN & COOPER,
BALLOU & MARX,
Attorneys for Defendants.

Endorsed: L. 5038. C. A. Brown *v.* J. D. Spreckels *et al.* Instructions. Defendants. Filed March 8th, 1906, 2:15 P. M. Job Batchelor, Clerk.

26 In the Circuit Court of the First Circuit, Territory of Hawaii, January Term, 1906.

C. A. BROWN
vs.
J. D. SPRECKELS ET AL.

Verdict.

We, the Jury in the above entitled cause find for Plaintiff.

Honolulu, T. H., March 8th, 1906. P. LISHMAN, *Foreman.*

Endorsed: L. 5038. Circuit Court, First Circuit. C. A. Brown *v.* J. D. Spreckels *et als.* Verdict. Filed March 8th, 1906, 5:25 P. M. Job Bachelor, Clerk.

27 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Defendants.

Ejectment.

Motion for Judgment Non Obstante Veredicto.

Now comes the defendants in the above entitled cause by their attorneys Kinney, McClanahan & Cooper and Ballou & Marx and move that judgment for the defendants be entered in the above entitled cause notwithstanding the verdict of the jury on the following grounds:

1. That the plaintiff has shown no title to the premises in controversy in this action and in particular that the plaintiff obtained no title by the release from Martha B. Pitman, it appearing from the undisputed evidence that he was not at the time of the delivery of said deed in possession of said premises or any part thereof, nor had he any right, title or interest therein.

2. That it appears from the undisputed evidence that the premises in controversy were so used, occupied and enjoyed in connection with the premises conveyed from Benjamin Pitman to Thomas Spencer by deed dated January 1, 1861, that they passed as an appurtenance of the lands by said deed conveyed.

28 3. That the undisputed evidence shows the exercise of a proprietary right by Thomas Spencer for a long period of time under circumstances which can be explained satisfactorily upon the hypothesis of a grant from Benjamin Pitman to Thomas Spencer of the premises in controversy and that it was the duty of the jury to presume such grant or other conveyance.

4. That the undisputed evidence shows that the Hawaiian Government is entitled to a large portion of the premises in controversy as accretions to its *ra*parian property extending from the corner of Front and Wainuenue Streets to the Government Wharf and that the evidence for the plaintiff failed to designate such portion, and the jury failed to find for the defendants as to such portion as required by plaintiffs' instruction XVII given by the Court to the jury.

This motion is based upon the record.

KINNEY, McCLANAHAN & COOPER,
BALLOU & MARX,
Attorneys for Defendants.

Honolulu, March 15, 1906.

To Magoon & Lightfoot and Holmes & Stanley, Attorneys fo Plaintiff:

Please take notice that we shall ask to — *b*eard on the above motio before Honorable J. T. De Bolt, Friday, March 16, 1906, at 9:3 A. M. or as soon thereafter as counsel can be heard.

KINNEY, McCLANAHAN & COOPER,
BALLOU & MARX,
Attorneys for Defendants.

Honolulu, March 15, 1906.

Endorsed: L. 5038. Circuit Court First Circuit Territory Hawaii. Charles A. Brown Plaintiff, *vs.* John D. Spreckels *et* defendant-. Ejectment. Motion for Judgment *Non Obstante Ve dicto.* —— ——, Judge. Filed March 15th, 1906, at 10:5 A. Job Batchelor, Clerk Ballou & Mark 303 Stangenwald Bldg. Hon lulu, Attorneys for Defendants. (Office No. —.)

29 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,

vs.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Defendants.

Ejectment.

Motion for New Trial.

Now come the defendants in the above entitled cause by their attorneys Kinney, McClanahan & Cooper and Ballou & Marx, pursuant to their notice of intention to move for a new trial given on March 8, 1906, after the rendition of the verdict herein and before the jury was discharged, and hereby move that a new trial be granted in the above entitled cause on the following grounds:

1. That the verdict in said cause rendered herein on March 8, 1906, was and is contrary to the law and the evidence and the weight of the evidence.

2. On the ground that the presiding Judge at the trial of said cause stated in substance in open Court after the evidence was closed and before the case was submitted to the jury, in ruling on a motion for a directed verdict, that he was inclined in favor of the plaintiff but did not want to grant the motion for a directed verdict as there was still some doubt in his mind and that should the jury render a verdict for the defendants and should a motion to set aside
30 that verdict be made, he might do so.

3. That said remarks of the presiding judge, although made in the absence of the jury, were published in substance in two newspapers of general circulation in Honolulu before said cause was submitted to the jury, were read by several of the jurors before the submission of the case to the jury, and were read aloud in the jury room by one of the jurors during the deliberations of the jury.

This motion is based upon the record and upon the affidavits of W. A. Kinney, Sidney M. Ballou and Frank C. Atherton hereunto attached and made a part hereof.

Honolulu, March 17, 1906.

KINNEY, McCLANAHAN & COOPER,
BALLOU & MARX,
Attorneys for Defendants.

31 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

C. A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS & BROS., Defendants.

Ejectment.

Affidavit of W. A. Kinney.

W. A. Kinney being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendants in the above entitled cause, and actively concerned in the trial of said cause before the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, wherein said cause was tried, said trial terminating upon the 8th day of March, A. D. 1906; that during the progress of said trial after all the evidence had been taken and submitted to the jury, plaintiff's counsel moved for a directed verdict upon all the evidence, on the ground that plaintiff's case had been established by the undisputed evidence. The jury were excused and this motion was argued in the Court room during Court room hours, but while the jury were absent and when very few spectators were present. After plaintiff's counsel had argued for some time in favor of said motion the Court checked any further argument and said that he would deny the motion, and in that connection made the remarks which were published in the Evening Bulletin, a daily paper published in the City of Honolulu, of
32 general circulation, under date of Wednesday, March 7th, 1906, and which read as follows:

"The long-drawn suit of Brown *vs.* Spreckels, wherein the plaintiff sues for the possession of a valuable piece of land on the Hilo waterfront, will finally go to the jury to-day, the indications being decidedly in the favor of the plaintiff. This was shown by a statement made by Judge De Bolt when he gave his ruling on a motion for a directed verdict in favor of the plaintiff.

Judge De Bolt said that he was inclined in favor of the plaintiff, but did not want to grant the motion for a directed verdict, as there was still some doubt in his mind. He might say, however, that should the jury render a verdict for the defendant- and should a motion to set aside that verdict be made, he might do so."

That when said remarks were made by the Court affiant realized that they would have a very serious influence upon the jury if they reached their ears, but the jury not being present, and as affiant supposed, no one connected with the press, it was believed that the matter might escape the attention of the jury and, therefore, no comment was made by counsel upon the remarks aforesaid of the Court. It turned out however, that a party, to-wit, George E. Sabin, a stenographer whose brother is connected with the press gave out the

remarks of the Court to one H. W. Kinney, a reporter on the Bulletin, who came into the Court room later, shortly before 12 o'clock noon, and in that way, as affiant is informed and believes, the views of the Court became public matter; later in the afternoon of said 7th day of March and while the jury were assembled and the trial was proceeding, the Court evidently learning that his comments had got into the paper, asked the jury not to read the evening paper, affiant believing that such instruction was not only void but futile, and would stimulate rather than deter the jury from reading the comments of the Court as contained in said issue of said Bulletin, and believing that if he acquiesced in the instruction given that it would be notice to the jury that he was fearful of what the jury might do, spoke up and said to the Court "We do not ask
33 for any such order, let the jury read the paper, we will take our chances," or words to that effect. Thereupon the Court desisted from following up said instruction, and the jury were left free to read the paper. Counsel did this because he was in a dilemma by reason of what had happened and felt that he would prejudice his case more in the eyes of the jury by attempting to keep the paper away from them than by assuming that it would have no effect upon them, though counsel well knew that the comments of the Court must have their effect upon the jury; affiant in taking the action aforesaid was attempting to minimize and lessen the mischief as much as possible; the next morning, the morning of Thursday, March 8th, the Pacific Commercial Advertiser, a daily newspaper of general circulation published in the City of Honolulu, contained the following statement in regard to said trial:

"To-day, the fourth day of the fourth week of trial, the Hilo waterfront case—C. A. Brown against John D. Spreckels and others—will go to the jury for a verdict. W. A. Kinney took about four hours yesterday afternoon in closing for defendants. J. A. Magoon will begin the address for plaintiff at 9 o'clock this morning.

Judge De Bolt dispensed with noon recess to hear a motion by plaintiff for a directed verdict in his favor. His denial of the motion was thus reported by an afternoon paper.

Judge De Bolt said that he was inclined in favor of the plaintiff, but did not want to grant the motion for a directed verdict, as there was still some doubt in his mind. He might say, however, that should the jury render a verdict for the defendant- and should a motion to set aside that verdict be made, he might do so.

As such motions are argued and decided in the absence of the jury, an Advertiser reporter asked Judge De Bolt after adjournment if he desired to say anything on the matter.

In reply he stated that he did make such an intimation of his view of the case to the attorneys. He did it entirely to save their time in arguing on the motion, but was not aware that any member of the press was present when he made the remarks.

34 "Argument for Defendants.

Mr. Kinney referred to it as a "Speculator's" case. Plaintiff must have his pound of flesh, but the blood must go with it.

Spreckels took the beach land from neither a rich man nor a poor man, and he held it without opposition for nine years.

If anyone went nosing through those records downstairs he would find many a property in Hawaii today with weak spots in its title. There was a popular impression that the law instigated litigation, but if the law was to make known every flaw of title in the records it would set pandemonium loose in this land.

If Captain Tom Spencer held that land against all comers from 1861 to 1881, then C. A. Brown had no claim on it at this day. He had only a deed from Martha Pitman made in 1889, after Ben Pitman's lips had been sealed for 31 years. For 39 years that property had been held adversely by Spencer and his successors.

Mr. Kinney argued, on the point of exclusive possession, that the fact of many people using the piece of beach as both thoroughfare and landing had no significance, because it was a gateway of the port on which the government always reserved an easement. Title on such a ground might as well be disputed in the case of an owner of taro patches along whose borders other people habitually made use of paths.

Spencer was not authorized to throw people off. He was not obliged to be a skinflint or a hog. The land was used the same way when the Pitmans held it. Though no Sunday School man, Spencer would open his warehouse for Sunday school picnics. He drove Chinese off, perhaps because of his Irish prejudice, when they were removing sand, but he personally superintended the taking of sand for Onomea plantation. It was before the days when owners were mean enough to charge for sand. The use by others was but permissive.

Ben Pitman nor anyone after him ever laid claim to this land. Hamlet was entirely left out of the play. The picking of a cocoanut or the hauling of a canoe on the place by any Pitman had not been shown.

Mr. Kinney spoke of Waialua before the lands were fenced, saying the road way was about a quarter of a mile wide. Yet after fencing, the government claimed only a reasonable width as road reservation.

On the point of "continuous" possession, he said this necessary element did not require Spencer to haul a canoe or to pile wood there every day."

That up to the time that the foregoing article appeared in the Pacific Commercial Advertiser there had been no direct admission by the Court or anyone else in the presence of the jury that the article appearing in the Evening Bulletin as hereinabove recited correctly stated the views or remarks of the Court, but by reason of the direct admission of the Court to the reporter of the Advertiser it became public matter that the Court had confirmed the truth of

the statements contained in the Bulletin and in fact did make
35 this statement at the time of denying plaintiff's motion for
a directed verdict; that said Bulletin and Advertiser have a wide circulation in the City of Honolulu, and the Advertiser being the only morning paper it is impossible to suppose that the jury did not read both of the above quoted articles in fact certain of the jurors have stated to affiant that the comments of the Court were known to the Jury before they retired to consider their verdict; that by reason of the premises the article in the Advertiser increased materially the mischief done by the comment made in Court and the publication thereof in the Bulletin as aforesaid; that while the remark in question was unquestionably made inadvertently by the Court without any purpose or intention of doing injury to the defendants' case, and all other talk of the Judge now complained of by defendants was equally inadvertent and was with no intention whatsoever of doing defendants any harm or injury, and while the Court did all that it could by instruction and otherwise to overcome the mischief done, affiant affirms on oath as his firm conviction and belief that there was no way of eradicating the prejudicial effect of the remark of the Court as to what it was likely to do if the jury rendered a verdict for the defendants, to-wit, the intimation of the Court that the Court was already strongly inclined in favor of setting aside any verdict that might be rendered by the jury in favor of the defendants; that the Court was not in a position to take that back or to assure the jury in any way that if they attempted to render a verdict for defendants that the Court would not follow the course suggestively outlined by the Court in the remarks herein objected to. And affiant on oath states that he believes and affirms that the Court
did state to the reporter of the Advertiser that his comments
36 as reported in the Bulletin were correctly reported, and that
as a matter of fact he did make the statements therein contained, for that said Judge has in open Court referred to the article in the Advertiser in the presence of the jury without any comment that he was misquoted therein or the facts incorrectly stated; and affiant on oath deposes and says that the result of the remarks by the Court, though not intended as such, clearly resulted in conveying the idea to the jury that it was useless to do anything but find for the plaintiff, and that defendants by reason of the premises have not had a fair and impartial trial, and cannot by reason of the premises have had such.

Affiant further states that on the morning that the article appeared in the Advertiser, above quoted, and shortly after the Court was open to resume the trial of the above entitled cause, W. L. Stanley, Esq., one of the attorneys for the plaintiff, stated in substance that affiant had intimated that counsel for plaintiff or some of them had caused the Bulletin to publish the comments of the
was
Court, as aforesaid, and that said charge ∧ unqualifiedly false, and that he desired the matter to be cleared up then and there, and the jury instructed to wholly disregard the accusation, whereupon affiant

stated that the accusation had been made and that an investigation should be had, claiming that the circumstances then were very suspicious and that affiant and his clients were entitled to the protection of the Court against such action, the remarks made by the Court having been clearly intended only for counsel, and it was an abuse of the confidence of the Court if the plaintiff or his attorneys in any way had been responsible for the publication in question; that said W. S. Stanley in reply to affiant stated that the com-
37 ments of the Court had been made in the public Court room during the progress of the trial and that spectators had been present any one of whom might have communicated the statements of the Court to the newspaper reporters, said Stanley further stated in that connection that he, Stanley, had noticed a stranger seated to one side of him (pointing to the chair occupied by said party), and he, Stanley, had noticed him taking stenographic notes, and suggested that this stranger may have been the party who communicated the statements of the Court to the press; that said Stanley at the time was referring to a party later identified as George E. Sabin, affiant remembering the individual in question and noticing him taking notes of some kind, and sitting on the left
G. H. C. of counsel for the plaintiff and facing them; that at all times while these remarks of said Stanley and affiant were being made Messrs. Magoon and Lightfoot, also attorneys for the plaintiff, were sitting by said W. L. Stanley and heard his reference to a stranger taking notes, etc.; that said Magoon or Lightfoot made no comment whatever to the Court or to opposing counsel disclosing the identity of the party in question, who afterwards turned out to be one George E. Sabin; that shortly after and while comment was still going on, said W. L. Stanley spoke up and said "I have learned that the name of this stranger is George E. Sabin," and that he is a brother of one Sabin a reporter on the Bulletin; that no other comment as far as affiant remembers was made by anyone disclosing further the identity of said Sabin or why he was in Court or his connection, if any, with the Brown-Spreckels suit beyond this that it appeared from the evidence of the bailiff and H. W. Kinney, reporter for the Bulletin, who were put on oath and examined touching the matter, that said Sabin had stepped back into the rear of the Court room shortly after the Court had made the comments
38 in question and furnished information of the same to said Kinney who thereupon caused it to be published in the Bulletin.

That affiant now learns upon reliable information that said George E. Sabin was well known to both Magoon and Lightfoot that he, Sabin, had occupied an office in the Magoon block for
G. H. C. sometime and had only [recently]* given up said office shortly before the day in question when he furnished the information aforesaid to the Bulletin; and furthermore affiant is credibly informed that said George E. Sabin was sufficiently

[* Words enclosed in brackets erased in copy.]

familiar with said Magoon and Lightfoot to use the telephone in their office, whereas affiant states that he was led to believe and had a right to believe from the talk of said Magoon and Lightfoot when the identity of said Sabin was in question that said Magoon and Lightfoot knew nothing of said Sabin and had no connection with him whatsoever and presumably did not even know his identity at the time that said Stanley spoke of said Sabin as a stranger and later announced that he had just learned that the individual in question was named George E. Sabin; that affiant never had seen the individual in question, so far as he could remember, before the trial of this cause; that once or twice he had noticed this individual in the Court room apparently taking some notes or listening, but beyond that knew neither his name his identity or anything whatsoever about him, and that affiant was led to believe by the remarks of said Stanley and by the silence and acquiescence of Magoon and Lightfoot that the said George E. Sabin was utterly unknown before that time to any one of the three, and that he, therefore had no connection or acquaintance with them prior to that time, and if affiant at that time had known of the positive acquaintance and association between said Magoon and Lightfoot and said Sabin that it
39 would have had a material effect upon the stand taken by counsel in reference to the remarks of the Court and the incidents resulting therefrom and following the same. Affiant is further credibly informed that said Sabin visited the office of said Magoon during the progress of the trial of this cause, and affiant states that under all the circumstances in the case he is justified in believing and charging that the information in question was given to the Bulletin in the interests of the plaintiff and to help the plaintiff and not impartially or as a matter of mere public interest and without motive or design; that none of the defendants were present at the trial at any time; that the leading defendants, John D. and Adolf Spreckels reside in San Francisco and have resided there for many years last past; that Walter M. Giffard, the attorney in fact of said John D. and Adolf Spreckels, was not present at the trial of said cause and had no means of knowing of the in-
G. H. C. cidents of the trial except as they appeared in the public
or
press [and]* were conveyed to him by third parties, affiant included; and affiant verily believes that said W. M. Giffard knew nothing of George E. Sabin or of his connection with said Magoon and Lightfoot prior to the termination of said
of
G. H. C. cause and the rendering ∧ the verdict therein. That when the Court first warned the jury not to read the article in the Bulletin in question, affiant had almost concluded his speech to the jury; that before affiant concluded the balance of his speech to the jury, to-wit, the next morning, March 8th, the matter of the publication of the article in the Bulletin had been thrashed

[*Words enclosed in brackets erased in copy.]

out and counsel for the plaintiff vindicated before the jury of any when affiant had no
G. H. C. connection with the article in question [or of the]* ∧ suspicion [that the effect]* of Sabin's acquaintance with Magoon and Lightfoot, his connection with them in the same office building, his visiting them during the trial of the case If affiant had known these facts
G. H. C. etc. ∧ would have led to additional enquiry and probing of the matter, and whether the result had still
40 vindicated plaintiff or not, defendant had the right to demand a mis-trial and the dismissal of the jury, and was entitled to exercise his discretion in asking for the same or not, with full knowledge of the facts and full knowledge that said Sabin was previously acquainted with said Magoon and Lightfoot, and he visited them as aforesaid, and by reason of the premises defendants' counsel were called upon in total ignorance of these facts to decide what best to do, and took the course indicated in the record and in this affidavit.

That the jury were out for three hours, and as affiant has been informed by some of them stood six to six for fully three hours, and affiant says that under these circumstances the fact that it was known that the Court practically doubted that defendants had even a *prima facie* case and intimated that it might be his duty to set a verdict aside for defendants could not operate but to stimulate those voting in the jury room for the plaintiff and to dishearten and discourage the private convictions of the six who were voting for the defendants. It presented a handicap that has nullified that jury trial and resulted in gross injustice to the defendants.

Affiant further states that when plaintiff's counsel was arguing for a directed verdict and the Court made the comments contained in the Bulletin, Mr. Ballou, associated with affiant as counsel for the defendants, then said to the Court—"Of course the comments of the Court are not to be used against us to the jury, or before the jury," to which said J. A. Magoon in a most emphatic manner replied "Certainly not."

And further affiant sayeth not.

WM. A. KINNEY.

Subscribed and sworn to before me this 13th day of March, A. D. 1906.

[NOTARIAL SEAL.] GUSSIE H. CLARK,
Notary Public First Judicial Circuit.

[* Words enclosed in brackets erased in copy.]

41 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,

vs.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Defendants.

Ejectment.

Affidavit of Sidney M. Ballou.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

Sidney M. Ballou being duly sworn on oath deposes and says that he is a member of the firm of Ballou & Marx, attorneys for the defendants in the above entitled cause; that affiant assisted William A. Kinney, leading counsel for defendants in the trial of said cause in the Circuit Court of the First Circuit, Honorable J. T. De Bolt, presiding, the trial beginning February 12, 1906, and ending March 8, 1906; that said W. A. Kinney and affiant were the only attorneys for the defendants who took part in the trial of said cause;

That the taking of evidence in said cause closed on the morning of Wednesday, March 7, 1906, whereupon counsel for the plaintiff moved for a directed verdict; that during the argument of said motion, jury was excused and that in denying said motion the presiding Judge stated in substance that he was inclined in favor of
42 the plaintiff, but did not want to grant the motion for a directed verdict as there was still some doubt in his mind, and further stated in substance that should the jury render a verdict for the defendants and should a motion to set aside that verdict be made, he might do so;

That after said remarks were made, it was agreed between Court and counsel on both sides in open Court, that such remarks were to be considered as confidential and not to be used to the jury, affiant at that time believing that there was no one present in Court excepting the Judge, the plaintiff, counsel and Court officials;

That the same afternoon there was published in the Evening Bulletin, one of the two evening papers published in the City of Honolulu, and a newspaper of general circulation, the substance of the remarks made by the presiding Judge, denying motion for a directed verdict, a copy of which publication is hereto attached and made a part of this affidavit.

Favors Plaintiff in Case of Brown-Spreckels.

The long-drawn suit of Brown *vs.* Spreckels, wherein the plaintiff sues for the possession of a valuable piece of land on the Hilo waterfront, will finally go to the jury today, the indications being de-

cidedly in the favor of the plaintiff. This was shown by a statement made by Judge De Bolt when he gave his ruling on a motion for a directed verdict in favor of the plaintiff.

Judge De Bolt said that he was inclined in favor of the plaintiff, but did not want to grant the motion for a directed verdict, as there was still some doubt in his mind. He might say, however, that should the jury render a verdict for the defendant and should a motion to set aside that verdict be made, he might do so.

That when Court adjourned on the afternoon of March 7th, W. A. Kinney had nearly concluded his address to the Jury. The Court in excusing the jury for the day, addressed them at some
43 length upon the subject of not allowing their verdict to be influenced by any information they might receive outside of the Court, and ended by requesting them not to read the evening paper; whereupon affiant informed said W. A. Kinney that the substance of the Judge's remark in denying the motion for directed verdict, had been published in the Bulletin, and said W. A. Kinney immediately stated in substance that he had been informed that some remarks of the Judge made within the Court room and intended to be confidential, had been given to the public press; that he saw no use in forbidding the jury to read the paper, and added a statement in substance as follows: "I would be willing to bet all the money in my pocket that the hand that slipped that into the Bulletin was the same hand that clipped those photographs." J. A. Magoon, one of the counsels for the plaintiff, retorted that Kinney was an infamous coward to make that assertion as he (Magoon) had had nothing to do with the publication of the matter in question. Kinney then disclaimed any reference to Magoon, stating that Magoon had testified that he had not clipped the photographs and therefore was not the person referred to, and the Court adjourned while the counsel was still discussing what Magoon's testimony had been with reference to the photographs.

On the morning of Thursday, March 8, 1906, the Pacific Commercial Advertiser, the only morning paper published in Honolulu, and a newspaper of general circulation, contained a publication headed: "Long Trial Now Ending—Judge De Bolt leans to Plaintiff—Kinney's argument," a copy of which publication is hereto attached and made a part of this affidavit;

44 Advertiser, Honolulu, March 8, 1906.

Long Trial Now Ending.

Judge De Bolt Leans to Plaintiff—Kinney's Argument.

Today, the fourth day of the fourth week of trial, the Hilo waterfront case—C. A. Brown against John D. Spreckels and others—will go to the jury for a verdict. W. A. Kinney took about four hours yesterday afternoon in closing for defendants. J. A. Magoon will begin the address for plaintiff at 9 o'clock this morning.

Judge De Bolt dispensed with noon recess to hear a motion by plaintiff for a directed verdict in his favor. His denial of the motion was thus reported by an afternoon paper:

"Judge De Bolt said that he was inclined in favor of the plaintiff, but did not want to grant the motion for a directed verdict, as there was still some doubt in his mind. He might say, however, that should the jury render a verdict for the defendant and should a motion to set aside that verdict be made, he might do so."

As such motions are argued and decided in the absence of the jury, an Advertiser reporter asked Judge De Bolt after adjournment if he desired to say anything on the matter.

In reply he stated that he did make such an intimation of his view of the case to the attorneys. He did it entirely to save their time in arguing on the motion, but was not aware that any member of the press was present when he made the remarks.

Argument for Defendants.

Mr. Kinney referred to it as a "speculator's" case. Plaintiff must have his pound of flesh, but the blood must go with it.

Spreckels took the beach land from neither a rich man nor a poor man, and he held it without opposition for nine years.

If anyone went nosing through those records downstairs he would find many a property in Hawaii today with weak spots in its title. There was a popular impression that the law instigated litigation, but if the law was to make known every flaw of title in the records it would set pandemonium loose in this land.

If Captain Tom Spencer held that land against all comers from 1861 to 1881, then C. A. Brown had no claim on it at this day. He had only a deed from Martha Pitman made in 1889, after Ben Pitman's lips had been sealed for 31 years. For 39 years that property had been held adversely by Spencer and his successors.

Mr. Kinney argued, on the point of exclusive possession, that the fact of many people using the piece of beach as both thoroughfare and landing had no significance, because it was a gateway of the port on which the government always reserved an easement. Title on such a ground might as well be disputed in the case of an owner of taro patches along whose borders other people habitually made use of paths.

Spencer was not authorized to throw people off. He was not obliged to be a skinflint or a hog. The land was used the same way when the Pitmans held it. Though no Sunday school man, Spencer would open his warehouse for Sunday school picnics. He drove Chinese off, perhaps because of his Irish prejudice, when they were removing sand, but he personally superintended the taking of sand for Onomea plantation. It was before the days when owners were mean enough to charge for sand. The use by others was but permissive.

Ben Pitman nor anyone after him ever laid claim to this land. Hamlet was entirely left out of the play. The picking of a cocoanut or the hauling of a canoe on the place by any Pitman had not been shown.

Mr. Kinney spoke of Waialua before the lands were fenced, saying the road way was about a quarter of a mile wide. Yet after fencing, the government claimed only a reasonable width as road reservation.

On the point of "continuous" possession, he said this necessary element did not require Spencer to haul a canoe or to pile wood there every day.

At the opening of Court on March 8, the jury being present W. L. Stanley, one of the counsel for plaintiff, referred to the accusation made by W. A. Kinney the night before and stated that said accusation should be withdrawn. Mr. Kinney stated the matter should be investigated upon sworn evidence and counsel for the plaintiff joined in said request. During the discussion prior to the calling
45 of witnesses, Judge Stanley referred to the presence in Court at times during the trial, of a person whom he described as a stranger who had been taking notes. There was a general discussion as to the identity of this stranger. His personal appearance was described by W. L. Stanley, and it appeared in the discussion, first, that the man's name was Sabin, and then that he was a brother of one of the editors of the Bulletin. During this discussion Messrs. Magoon & Lightfoot, the other attorneys for the plaintiff, remained silent and did not offer any suggestions as to the identity of the person under discussion, from which affiant was led to believe and did believe that said person, afterwards identified as George E. Sabin, was a stranger to all three of the counsel for the plaintiff present;

That thereafter in the presence of the jury C. A. K. Hawkins, the Court bailiff, and H. W. Kinney, a reporter of the Bulletin, were sworn and testified as witnesses, from which it appeared that said H. W. Kinney had received the news items in question from said George E. Sabin, that thereupon said W. A. Kinney withdrew the accusation he had made the afternoon previous, and proceeded with his argument, which procedure was acquiesced in by affiant, affiant then believing that the information had come from some one who was an entire stranger to all three of the counsel for the plaintiff;

That thereupon said W. A. Kinney closed his argument to the jury speaking six minutes in so closing; then immediately J. A. Magoon addressed the jury for the plaintiff, speaking the allotted time of two hours; that immediately thereafter the Court gave its instructions to the jury and submitted the case to the jury at about 12:20 P. M.; that upon the afternoon of *of* the same day, to
46 wit, about 5:30 P. M., the jury returned a *a* verdict in favor of the plaintiff;

That affiant has learned since the rendering of the verdict, upon credible information, that said George E. Sabin was well known, both to said J. A. Magoon and J. Lightfoot; that while renting an office in the Magoon Block, in the same building and on the same floor as the offices of said J. A. Magoon and J. Lightfoot, which office he occupied until a short time before the trial of the cause, he was in the habit of using the same telephone as Messrs. Magoon & Lightfoot and advertising the same as his telephone, and that he had

visited the offices of said J. A. Magoon and conversed with him during the trial of this cause;

That had affiant known all these facts before the submission of said case to the jury, he would not have rested upon the belief that the information had been given out by a stranger, but would have requested further investigation or advised his senior counsel, W. A. Kinney, to demand a mis-trial according to circumstances;

And this affiant further says that none of the defendants in the above entitled cause were present in court during any of the proceedings with the exception of W. C. Borden, who was a witness for the plaintiff, and affiant is informed and believes that he departed for Hilo before the matter of the publication in the Bulletin came up; that the Spreckels Brothers, defendants herein, are residents of San Francisco and that their agents in Honolulu are the corporation of W. G. Irwin & Company, Limited, and that none of the members of said corporation were present in Court or had any means of learning or knowing any of the facts concerning the acquaintance
47 of said George E. Sabin with said J. A. Magoon and J. Lightfoot or either of them between the time that the identity of said George E. Sabin was disclosed and the time of the rendering of the verdict by the jury;

And further affiant sayeth not.

SIDNEY M. BALLOU.

Subscribed and sworn to before me this 17th day of March, 1906.

[NOTARIAL SEAL.] N. FERNANDEZ,
Notary Public, First Judicial Circuit, Territory of Hawaii.

48 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Defendants.

Ejectment.

Affidavit of Frank C. Atherton.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

Frank C. Atherton, being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that during the deliberation of the jury in the Jury Room after the case had been submitted to them, the matter of the publication in the newspapers of Judge De Bolt's remarks in denying a motion for a di-

rected verdict, was mentioned, that some of the jurors stated that they had read the same and that others said they had not, and that thereupon one of the jurors produced a paper and read said report of Judge De Bolt's remarks aloud; that said newspaper was
49 either the Evening Bulletin or the Pacific Commercial Advertiser, and to the best of affiant's recolletcion and belief it was the Advertiser of that morning.

And further affiant sayeth not.

FRANK C. ATHERTON.

Subscribed and sworn to before me this 17th day of March, 1906.

[NOTARIAL SEAL.] N. FERNANDEZ,
Notary Public, First Judicial Circuit.

Endorsed: L. 5038. Circuit Court, First Circuit, Territory of Hawaii. Charles A. Brown Plaintiff *vs.* John D. Spreckels *et al.* Defendant. Ejectment. Motion for New Trial and Affidavits. Judge —— ——. Filed March 17, 1906. George Lucas, Clerk. Ballou & Marx 303 Stangenwald Bldg. Honolulu Attorneys for —— —— (Office No. —.) Motion denied M'ch 30/06.

50 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Affidavit of George E. Sabin.

TERRITORY OF HAWAII, *County of Oahu, ss:*

Now comes George E. Sabin, who being first duly sworn on oath deposes and says that he is a Stenographer by profession, that heretofore, to-wit:—on or about the middle of December, 1905, affiant rented a room or office in the building situate at the corner of Alakea and Merchant Streets, Honolulu, known as the "Magoon Building;" that he rented said room from C. H. McBride, a tenant of J. A. Magoon; that affiant used said room or office for about two weeks when he ceased to occupy the same, and has not since visited said building, excepting on one or two occasions immediately thereafter, when he went there in the evening on business with C. H. McBride, who conducted an Evening school at said place; that while occupying said room or office as aforesaid, affiant used the telephone in the hall way of said building; that affiant did not, while occupying said room or office or at any other time enter the office of Mr. J. A. Magoon or Mr. J. Lightfoot or of the firm of Magoon and Lightfoot; that affiant never had any conversation with said Magoon,
51 except on one occasion during the latter part of the trial affiant made the following casual remark to said Magoon, viz:—"Hadn't you better get a bed for the witness;" that said re-

mark was made in view of the fact that the argument of counsel on an objection to a question put to the witness (who was a very old man) lasted for probably fifteen or twenty minutes; that affiant never had any conversation with said Lightfoot on any subject whatever, prior to the 17th day of March, 1906, when said Lightfoot called on affiant at the office of Messrs. Castle & Withington in Honolulu. That affiant had no dealings of any kind with said Magoon, Lightfoot or said firm of Magoon and Lightfoot, except as hereinabove set forth; that affiant has been in the habit of attending the courts for the purpose of writing in shorthand the court proceedings, with the object of increasing his speed in stenography; and affiant frequently during the hearing of the above entitled cause before the Honorable J. T. De Bolt, Judge, attended in court and made some stenographic notes of the proceedings, as he did before the other Honorable Circuit Judges that affiant was in Judge De Bolt's court on Wednesday, the 7th day of March, 1906, when the Honorable Judge De Bolt overruled plaintiff's motion for a directed verdict, and affiant heard the remarks of the court in overruling said motion and reported the same to H. W. Kinney, a reporter of the Evening Bulletin, upon a request made to him by said Kinney for "What is new;" that in reporting said remarks to said Kinney affiant was not acting on any advice or suggestion of Charles A. Brown, plaintiff above named, or J. A. Magoon or J. Lightfoot or anyone else on their behalf; but affiant acted solely upon his own responsibility and in response to the request of said Kinney, reporter above named.

And affiant further shows that he has never spoken a word
52 on any subject at any time or in any place to said J. A. Magoon or to said J. Lightfoot or to said Charles A. Brown, except as heretofore stated, and that he is a stranger to said Magoon and Charles A. Brown, and was a stranger to the said Lightfoot at all times prior to the conversation aforesaid.

Affiant further shows that on or about the middle of December, 1905, he requested the authorization from a certain Miss Low, who was an employee of the said Magoon and Lightfoot, to use their telephone, which was located in the Hall-way of said Magoon building, and also that he might indicate the telephone number on his business cards, and that the said Miss Low stated to affiant that she thought it would be all right to do so, that it was the custom of the tenants to use said telephone, and so authorized affiant to use the same.

And affiant further says that it is not true so far as affiant is aware that affiant was well known to Magoon and Lightfoot, or that affiant was familiar with said Magoon and Lightfoot, and it is also untrue that there is any positive acquaintance and association between said Magoon and Lightfoot and affiant; and affiant further says that it is not true that affiant visited the office of said Magoon or Lightfoot during the progress of the trial of the above entitled cause, and affiant further says that the information in question was not given to the Evening Bulletin by affiant in the interests of the plaintiff and to help plaintiff, but said information was given impartially

and as a possible matter of interest to his (affiant's) brother, Wm. F. Sabin, City Editor of the said Bulletin, and without other motive or design.

And affiant further states that he has no interest whatever in the proceedings in court, and makes this affidavit freely and vol-
53 untarily and without any remuneration, reward or hope thereof from C. A. Brown, or any one acting for him or on his behalf, or from anyone whatsoever.

Dated, Honolulu, March 20, 1906.

GEORGE E. SABIN.

Subscribed and sworn to before me this 20th day of March, 1906.
GEORGE LUCAS, *Clerk.*

Endorsed: L. 5038. Circuit Court First Judicial Circuit. Territory of Hawaii. Charles A. Brown, Pl'ff *vs.* J. D. Spreckels, *et al.* D'f'ts. Affidavit of G. E. Sabin. Filed March 20, 1906, at 9.40 A. M. George Lucas, Clerk.

54 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Counter Affidavits Filed by Plaintiff in Opposition to Defendant's Motion for a New Trial.

Affidavit of J. Alfred Magoon.
Affidavit of J. Lightfoot.
Affidavit of Charles A. Brown.

55 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of J. Alfred Magoon.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes J. Alfred Magoon and being first duly sworn on oath deposes and says that deponent did not on the 8th day of March 1906 know George E. Sabin by name and has never up to this

time spoken to him even to pass the time of day; that deponent had during the months of December 1905 or January 1906, seen said George E. Sabin in the hall way of deponent's building at the corner of Alakea and Merchant Streets in Honolulu, without knowing his business or his name, but deponent is under the impression that he learned in some way during the period that he saw said Sabin in his building as aforesaid, that said Sabin had taken an office with one of deponent's tenants in said building and that he was a stenographer; that deponent also saw said Sabin about that time in the rooms of the Circuit Court in Honolulu, appearing to be writing stenography, and deponent thought that he was probably seeking a position as Court Stenographer; that deponent did not directly through said Sabin or indirectly through any person, ever
56 cause, encourage or countenance in any way the publication of Judge De Bolt's remarks made at the time of the denial by him of motion for directed verdict in the above entitled cause nor was deponent cognizant of a purpose on the part of said Sabin or any other person to publish or cause the same to be published; that the appearance of the same in the Evening Bulletin of March 7, 1906, was a great surprise to deponent, and the first intimation that deponent had that said remarks had been published was after the court had requested, as a personal favor, that the jury should not read the papers, when W. A. Kinney expressly stated that he desired that the jury should read the papers and the remarks of the Judge in overruling the motion for a directed verdict which he charged was published by con-ivance on the side of the plaintiff; that on the morning of the 8th of March after Honorable W. L. Stanley had called the Court's attention to the charge of said Kinney the evening before, said Kinney requested the Court to investigate the matter in which request Messrs. Stanley and Lightfoot joined; deponent remaining silent; that when his Honor, Judge De Bolt, expressed himself as being opposed to such an investigation, deponent rose and demanded as a matter of right, that such investigation be held whereupon said Kinney said if such an investigation was begun, he should go into it exhaustively and deponent stated, "The more thorough, the better" and that the Court ought to allow, if necessary, a whole day for the investigation; that deponent could not address the jury so long as they might have a doubt upon the proposition of deponent's being in any way a party to the publication; that deponent suggested telephoning to the witnesses whom said Kinney might want to call and this suggestion was acted upon: and while waiting for the arrival of the witnesses telephoned
57 to, Chas. A. Hopkins Jr. was called and testified among other things: that said Sabin, who had been taking notes from time to time during the trial, had been in the Court-room during the afternoon of the preceding day and had spoken to him, said Hopkins, and to the Clerk of the Court. He also testified that said Sabin had had an office in deponent's building; that at about the time said Hopkins left the stand, one, H. W. Kinney, an editor of the Bulletin, arrived and was immediately sworn as witness and stated that he received the report of the Judge's remarks shortly before

twelve o'clock from said Sabin who was at that time in the Court-room of Judge De Bolt's Court; that thereupon said Kinney withdrew his charges with the statement to the effect that it gave him pleasure to know that the other side had had nothing to do with the publication; that after said W. A. Kinney had withdrawn his charge with reference to said publication and had concluded his ad-ress to the jury, deponent began to address the jury and at the very opening of his remarks said in substance that while he was desirous of a verdict in his favor and notwithstanding the great cost to the plaintiff and what an adverse verdict to the plaintiff would mean, deponent did not want a verdict in his favor unless the jurors conscientiously felt that he was entitled to the same that when they were sworn as jurors they agreed to render their verdict upon the law and the evidence and regardless of all outside influence that they were the sole Judges of the facts and it was entirely immaterial what his Honor J. T. De Bolt thought about the facts, he was only one man and they were twelve and his opinion ought to have no influence whatever upon their verdict;

That deponent believes the jurors in said cause were exceptional intelligent and conscientious men and believes that if said
58 W. A. Kinney had not requested that the jurors should read the remarks of said Judge that they would not have done so and that if said W. A. Kinney had desired to make the matter absolutely sure, he might have requested the Court to confine the jurors for the night. That deponent believes that said jurors did not in violation of their oaths permit the published remarks of the Court to influence them one iota one way or the other, that to neutralize any effect that the remarks might have upon the jurors said S. M. Ballou expressly had the Court state to the jury that his remarks had been made without having heard argument on the part of the defendants, while Mr. Lightfoot was arguing the matter in order to cut off debate, and that if he had heard the argument for defendant upon said motion for said verdict, he might have changed his mind and that he would not be bound by the conclusions that he had expressed in case a motion for new trial should be presented and that he might entirely change his mind upon fully hearing argument in the matter from defendants.

J. ALFRED MAGOON.

Subscribed and sworn to before me this 20th day of March 1906.

F. W. WUNDENBERG,

[NOTARIAL SEAL.] *Notary Public.*

59 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of J. Lightfoot.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes J. Lightfoot and being first duly sworn on oath deposes and says that he was actively engaged in the Circuit Court of the First Judicial Circuit at the trial of the above entitled cause at the January, 1906 Term of said Court;

That affiant knows George E. Sabin. That affiant had a conversation with said Sabin in the presence of J. A. Gibson at the office of Messrs. Castle & Withington, in Honolulu on Saturday the 17th day of March, A. D. 1906, at about 2 o'clock in the afternoon of said day and after affiant had been served by Sidney M. Ballou with a motion for new trial in the above entitled cause;

That prior to said conversation, affiant has never spoken a word to said Sabin at any time or in any place; that affiant prior to said conversation, had never had any dealings with said Sabin directly or indirectly; that affiant, during the progress of the trial of the above entitled cause in said Circuit Court, noticed the said
60 Sabin seated in Court taking, it seemed to affiant, shorthand notes of the proceedings; that affiant did not then know the name of said Sabin, did not know his business except that he appeared to be a stenographer and did not know that said Sabin was connected directly or indirectly with the Evening Bulletin or with any newspaper; that affiant did not communicate with said Evening Bulletin directly or indirectly, either through said Sabin or through any one else in the matter of the statement made by the Honorable J. T. De Bolt, First Judge, appearing in the Evening Bulletin of said day in overruling plaintiff's motion for a directed verdict.

That said statement, as affiant now remembers, was made by the Honorable Judge shortly before the noon hour of Wednesday the 7th day of March, 1906. That immediately after the overruling of said motion, the Court commenced the consideration of the instructions requested by plaintiff and by defendants; and that as affiant now remembers, the consideration of said instructions continued uninterruptedly until about fifteen minutes before two o'clock, affiant being present in court during all the time of the consideration of said instructions; that the jury had been ordered to return at two o'clock and affiant never left the precincts of the Court from the time the court sat at ten o'clock in the forenoon of said day to the time that it adjourned, as affiant now remembers, a few minutes

before four of the afternoon of said day that during all the time of said day mentioned, affiant never communicated with the Evening Bulletin directly or indirectly, affiant did not send any message to said Evening Bulletin either by said Sabin or by any other means in the matter of said statement made by said Judge or any other matter; that it was a matter of astonishment to affiant
61 when W. A. Kinney arose in Court shortly before four o'clock in the afternoon of said day and stated that the Evening Bulletin had an account of said sta-ment made by said Judge.

That affiant was informed by said Sabin in the conversation above referred to that some time ago he, Sabin, had rented a room in the Magoon office building, corner of Merchant and Alakea Sts. from one McBride, who occupies a portion of said building as a tenant of J. Alfred Magoon; that affiant does not remember seeing Sabin in said building at any time; that said Sabin may have used the telephone in said building but affiant cannot remember having seen him do so; that said Sabin has never been in affiant's office in said building or in the office of J. Alfred Magoon in said building when affiant was present, and affiant has never heard of said Sabin visiting said offices; that affiant had no conversation with said Sabin in said office or elsewhere during the progress of said trial or at any time except as hereinabove set forth.

And affiant further says that he remembers being in Court shortly before four o'clock in the afternoon of Wednesday, the 7th day of March, 1906 at the time when W. A. Kinney concluded for that day the address to the jury; that the Honorable J. T. De Bolt, First Judge before excusing the jury until the following day, admonished the jury not to discuss the case among themselves or with others, not to allow anything to influence them and the Court requested said jurors, as a matter of personal favor to the Court, to refrain from reading the newspaper of that and the following day; whereupon said Kinney interrupted the Court and stated in effect that he understood that there was an account in the Evening Bulletin of the Judge's remarks on overruling the plaintiff's motion for
62 a directed verdict and that he, Kinney, had no objection to said jurors reading the newspaper; whereupon the Court said in effect, "well seeing that the parties have no objection, you may read the newspaper;" and affiant further says in this connection, that while the reference to the newspaper aforesaid was made in open Court and in the presence of the jury yet no statement was made by W. A. Kinney or any one else as to what the statement was; and affiant believes that the jury were at that time ignorant of what the statement was which was referred to by said Kinney; and affiant further says that he was in Court on the following day when J. Alfred Magoon addressed the jury, that said Magoon in the beginning of his address stated that he regretted the episode of the newspaper's publication of the remarks of the Honorable Judge and urged the jurors not to allow that episode to influence them in the slightest degree one way or the other, that said Magoon while being anxious to obtain a verdict in favor of plaintiff, wished to do

so only by fair means and affiant believes that the jury heeded the request of said Magoon and the admonitions of the Court frequently and impressedly delivered to said jury and arrived at their verdict solely upon the law and the evidence and wholly disregarded the newspaper accounts of said trial.

And affiant further says that he has read the affidavits *to* W. A. Kinney and of Sidney M. Ballou filed herein in support of defendant's motion for a new trial. That it is true that affiant was sitting by W. L. Whitney while said Stanley was addressing the Court as alleged on page 7 of said Kinney affidavit and on page 5 of said Ballou affidavit; and it is also true that affiant remained silent, and affiant further says that he remained silent for three reasons. First,
63 because said Stanley was addressing the Court, Second, when said Stanley completed his address to the Court, said Kinney took the floor and it would have been impossible to get in a word even had affiant so desired and Third because affiant had nothing to say, as affiant did not know who the person taking the notes was, what was his name or what his business and affiant did not know that said person was in Court when said motion was overruled.

In answer to that portion of said Kinney affidavit which says (page 8) "That affiant now learns upon reliable information that said George E. Sabin was well known to both Magoon and Lightfoot" affiant says that the "reliable information" referred to by Kinney is false, and further affiant believes that said Kinney knew it
that ∧ was false, and that said Kinney made use of said "reliable information" not in fact in the interest of justice and fair dealing but with willful and malicious purpose of misleading the Court, by the false statement as aforesaid, and affiant further states that all portions of said Kinney affidavit and said Ballou affidavit wherein the statement is made or inferred that affiant knew said Sabin or knew his business on the day in question or theretofore, or that affiant communicated with said Sabin on any subject on the day in question are utterly untrue and unwarranted.

In regard to the allegation in said Kinney affidavit (page 10) that Mr. Ballou said, "of course the comments of the Court are not to be used against us to the jury, or before the jury" to which said J. Alfred Magoon in a most emphatic manner replied "Certainly NOT," affiant believes that the same is true in substance and effect, although affiant cannot now remember the exact word spoken, and further affiant says that this was his understanding of the matter, that the remarks of *of* the Court were addressed to counsel
64 and were in their nature confidential, and not intended for the public generally or for the jury, and affiant while exonerating said Sabin from any wrongful intent in the matter, believes that it would have been highly improper for any of counsel on either side, to have assisted in the public announcement of said confidential remarks, and would have been almost as reprehensible as the conduct of said Kinney on many occasions during said trial and par-

ticularly in the conduct of said Kinney in making in the presence of the jury false and malicious attacks upon opposing counsel.

And further affiant sayeth not.

J. LIGHTFOOT.

Dated, Honolulu, March 19, 1906.

Subscribed and sworn to before me this 19th day of March, 1906.

F. W. WUNDENBERG,
Notary Public.

[NOTARIAL SEAL.]

65 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of Charles A. Brown.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes Charles A. Brown, the plaintiff above named, and being duly sworn on oath deposes and says:

That he has never spoken to George E. Sabin not even passing the time of day with him. That he did not know of the remarks of Judge J. T. De Bolt upon the denial of the motion made in deponent's behalf for a directed verdict as published in the Bulletin of the 7th of March 1906, until after the paper of that day was issued. That deponent did not directly or indirectly procure cause or sanction the publication of said article or any other article appearing in any paper during the progress of said trial.

CHARLES A. BROWN.

Honolulu, T. H., March 20, 1906.

Subscribed and sworn to before me this 20th day of March, 1906.

F. W. WUNDENBERG,
Notary Public.

[NOTARIAL SEAL.]

Endorsed: L. 5038. First Circuit Court Territory of Hawaii. In Term. C. A. Brown *vs.* J. D. Spreckels *et al.* Counter Affidavits of J. Alfred Magoon, J. Lightfoot C. A. Brown. Filed March 20th, 1906 2:23 p. m. Job Batchelor, Clerk Magoon & Lightfoot Magoon Building Honolulu Attorneys for Plaintiff.

66 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of H. P. Benson.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes H. P. Benson and being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict [had the request not been withdrawn]* had not W. A. Kinney said he had no objection to the jury reading the same W. S. ∧; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

H. P. BENSON.

Subscribed and sworn to before me this 22nd day of March, 1906.
[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

67 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of James E. Jaeger.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes James E. Jaeger and being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T.

[* Words enclosed in brackets erased in copy.]

De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

JAMES E. JAEGER.

Subscribed and sworn to before me this 24th day of March, 1906.

[NOTARIAL SEAL.] N. FERNANDEZ,
Notary Public, First Judicial Circuit.

68 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of Thos. W. Chase.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes Thos. W. Chase and being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

THOS. W. CHASE.

Subscribed and sworn to before me this 24th day of March, 1906.

[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

69 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of P. Lishman.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes P. Lishman and being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

P. LISHMAN.

Subscribed and sworn to before me this 22nd day of March, 1906.

[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

70 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of Wm. Buckle.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes Wm. Buckle and being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the

jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

WM. BUCKLE.

Subscribed and sworn to before me this 22nd day of March, 1906.

[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

71 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of H. W. Doane.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes H. W. Doane and being duly sworn on oath deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

H. W. DOANE.

Subscribed and sworn to before me this 22nd day of March, 1906.

[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

72 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of G. H. Cowan.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes G. H. Cowan and being duly sworn on oath deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

C. H. COWAN.

Subscribed and sworn to before me this 22nd day of March, 1906.

[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

73 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of G. G. Fuller.

CITY OF HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

Now comes G. G. Fuller and being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plain-

not W. A. Kinney said that he had no objection to the jury reading the same
W. S. tiff for a directed verdict had ^ [the request not been withdrawn;]* that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

G. G. FULLER.

Subscribed and sworn to before me this 22nd day of March, 1906.

[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

74 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of Chas. H. Pfeiffer.

CITY OF HONOLULU,
County of Oahu, Territory of Hawaii, ss:

Now comes Chas. H. Pfeiffer and being duly sworn on oath deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

CHAS. H. PFEIFFER.

Subscribed and sworn to before me this 22nd day of March, 1906.

[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

[* Words enclosed in brackets erased in copy.]

75 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of A. M. Mellis.

CITY OF HONOLULU,
County of Oahu, Territory of Hawaii, ss:

Now comes A. M. Mellis and being duly sworn on oath deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

A. M. MELLIS.

Subscribed and sworn to before me this 22nd day of March, 1906.
[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

76 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of Jno. T. Michell.

CITY OF HONOLULU,
County of Oahu, Territory of Hawaii, ss:

Now comes Jno. T. Michell, and being duly sworn on oath deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the re-

marks of His Honor made in the overruling of the motion of plaintiff for a directed verdict had not W. A. Kinney said he had no objection to the jury reading the same; that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

JNO. T. MICHELL.

Subscribed and sworn to before me this 22nd day of March, 1906.
[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

77 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Affidavit of F. C. Atherton.

CITY OF HONOLULU,
County of Oahu, Territory of Hawaii, ss:

Now comes F. C. Atherton and being duly sworn on oath, deposes and says that he was one of the jurors in the above entitled cause, that he would have heeded the request of His Honor, J. T. De Bolt, made on the 7th day of March, 1906, not to read the remarks of His Honor made in the overruling of the motion of plaintiff for a directed

not W. A. Kinney said that he had no objection
to the jury reading the same
W. S. verdict had ∧ [the request not been withdrawn;]* that deponent understood both from the remarks of J. Alfred Magoon and His Honor that the jury was not to consider nor be influenced in any way by those remarks; that deponent rendered his verdict in said case impartially and upon the merits without any regard to said remarks, and after careful consideration of the evidence and the instructions of His Honor.

F. C. ATHERTON.

Subscribed and sworn to before me this 22nd day of March, 1906.
[NOTARIAL SEAL.] WILLIAM SAVIDGE,
Notary Public, First Judicial Circuit.

Endorsed: L. 5037/8. First Circuit Court Territory of Hawaii. In Term. Charles A. Brown, Plaintiff, *vs.* J. D. Spreckels,
78 defendants. Affidavits of H. P. Benson, James E. Jaeger, Thos. W. Chase, P. Lishman, Wm. Buckle, H. W. Doane,

H. G. Cowan, G. G. Fuller, Chas. H. Pfeiffer, A. M. Mellis, Jno. T. Mitchell, F. C. Atherton. Filed March 26, 1906, 8:5 A. M. Job Batchelor, Clerk. Magoon & Lightfoot, Magoon Building, Honolulu, Attorneys for Plaintiff.

79 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, 1906.

Law. No. 5037.

CHARLES A. BROWN, Plaintiff,

vs.

JOHN D. SPRECKELS and ADOLPH B. SPRECKELS, Partners Doing Business under the Name of J. D. SPRECKELS BROS., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Defendants.

Ejectment.

Reply Affidavit of W. A. Kinney on Defendants' Motion for a New Trial.

HONOLULU, *County of Oahu, Territory of Hawaii, ss:*

W. A. Kinney being first duly sworn on oath deposes and says:

That he has read the counter affidavits filed herein by plaintiff, as also the affidavit of George E. Sabin, filed in said cause, and in reference thereto makes the following statements under oath:—

Affiant has only spoken of the merits of the case to two of the jurors, to-wit, James E. Jaeger and Frank C. Atherton, and then only when the matter was brought up by the jurors themselves; that the talk with said James E. Jaeger is as follows:

A day or so after the jury had rendered their verdict in this cause affiant was standing by the Bank of Hawaii on the corner of Fort and Merchant Street; that said James E. Jaeger was coming
80 along Merchant Street towards Fort Street and started to go down Fort Street, and looking across he saw affiant and thereupon walked across, shook hands with affiant and said that he was very sorry that the defendants did not get a verdict in the case just tried. He said "You know how it was; we stood six to six for a long "time, but we could not budge the six that were voting for C. A. "Brown. After the Judge's remarks it was like going up against "a stone wall; the other side knew they had the Court with them;

turn

W. A. Kinney. "our efforts to convince them or [govern]* them "had no effect whatever;" that shortly before the aforesaid talk with Jaeger affiant met J. Lucas, the Supervisor, a personal friend of affiant's, who said—"Kinney, you know why you "lost that case?" and thereupon stated to affiant—"I met one of the

[*Words enclosed in brackets erased in copy.]

" jurors last night and he told me the Judge's remarks killed the de-
" fendants' case, that there was no show after that for defendants to
" win;" affiant did not ask who the juror was nor did said Lucas volunteer to state who he was, nor has affiant since asked Lucas who he was, but from the fact that said Lucas later on in the conversation asked if affiant had had any talk with Jaeger about the case, affiant inferred that said Lucas was referring to Jaeger, which surmise was later confirmed by the fact that Jaeger himself volunteered remarks of a like effect to affiant as hereinabove recited; that upon affiant's return from Kauai, either Friday or Saturday of last week affiant met said Jaeger again in the store of the Pacific Hardware Co., that said Jaeger then brought the question up again by asking affiant if he, affiant, was around after affidavits from the jury. Affiant said "No, why, is the other side," whereupon said Jaeger replied—"Yes, they are trying to get affidavits from all the jury; I refused to sign; I said I would not sign affidavits for either side;" that on Monday morning, March 26th, affiant found among the other affi-
81 davits of the jurors an affidavit by Jaeger as contained on the files; later, having business with Allen & Robinson, where said Jaeger is employed, said Jaeger himself brought up the matter again, probably believing that after his statement to affiant that he had refused to sign affidavits, some explanation was due affiant of his change of mind as shown by the fact that he had later signed an affidavit in behalf of the plaintiff. Said Jaeger then made the following statement to affiant:

That C. A. Brown, the plaintiff, came to him personally and said that they were old friends and that he should like to have an affidavit from him like those signed by the other jurors, if possible, and that said C. A. Brown said to Jaeger—"If you don't sign an affidavit that
" you disregarded the Judge's remarks it will leave you all alone by
" yourself, as all the other jurors have signed affidavits to the effect
" that the Judge's remarks were not considered by them in arriving
" at a verdict, and it will also look as if you were not able to say
" that your verdict had been arrived at without regard to the Judge's
" remarks." In other words, as Jaeger put it to affiant, he would be left in the position of having rendered a verdict without obeying the Judge's instructions that they, the jury, were to disregard any remarks he may have made on the merits of the case, as contained in the newspapers, or otherwise, and thereupon said Jaeger agreed to sign the affidavit, and did sign it, and affirmed the
W. A. Kinney. same to be the truth, [at the same time]* stating however to affiant that by said affidavit he did not intend to take back nor did he take back his prior statement to affiant that the Judge's remarks on the merits of the case, as reported in the papers, destroyed the defendants' chance of getting a verdict. Said Jaeger also said that the merits of the case were fully and
82 fairly discussed by the jury and the various phases of it, but still left unmodified his statement to affiant as to the force and effect of the judge's remarks which got into the papers.

[* Words enclosed in brackets erased in copy.]

Affiant further states that he met Mr. Atherton, a juror in said
ıse, a day or so after the verdict; that said juror stopped and of his
n accord entered into a full discussion of the case; said Atherton
ted that the jury would very much have liked to have given the
ıd to the Government, but were confronted with the instructions
the Court that the plaintiff had made out a perfect paper title to
th the Bates and Kalailoa pieces, and that therefore it resolved
elf into a question of whether this title of plaintiff had been over-
ne by any of the defences set up by the defendants thereto; that
matter of adverse possession, of presumptive deed and appur-
ıance was fully, fairly and exhaustively discussed by the jury
d that he, Atherton, finally was convinced that he ought to yield;
ıt affiant then asked Atherton if he thought the remarks of the
urt affected the decision of the jury, whereupon said Atherton said
ıt he thought not, that is, that when they went into the jury room
was agreed that the Judge's remarks should not have weight, and
had no reason to believe that they did have weight; there was no
dence of it in the discussion in the jury room, but said Atherton
ted that he, of course, could not answer for the minds or thoughts
others than himself.

That in answer to the affidavit filed by George E. Sabin affiant
shes to state that he, affiant, saw Kinney, reporter of the Bulletin,
as described by him on
Court the witness stand
W. A. Kinney. come into the ^ room ^ and have a short talk
with the bailiff of the Court, and fearing that
nething may have been said about the remarks of the Court to the
said Kinney, affiant followed said Kinney out and asked him
if the bailiff had told him anything about what had happened
in the Court room in the Brown-Speckels case, and he said—
)h, no, he was talking to me about an entirely different matter—
rhy, has anything of interest happened in the case: If you wish to
nake any statement I will be pleased to take it down and put it in
he paper," whereupon affiant said that he had nothing further to
about it, that it was merely an enquiry as to whether said Kinney
d received information about anything that had happened in the
urt.

Affiant further states that to the best of his recollection [said Sabin
it was immediately
W. A. Kinney. was present]* ^ after the Court had made the
that
W. A. Kinney. comments in question upon the case, [when]*
to the Court
W. A. Kinney. Mr. Ballou, of counsel, said in substance ^ that,
of course, nothing would be said or done to
and J. A. Magoon replied certainly not
W. A. Kinney. prejudice the jury in this matter ^. And affiant
further states that though there have been five
y trials of this cause the issue as to the presumption of a lost deed,
d the issue of the beach being appurtenant to the land covered

*Words enclosed in brackets erased in copy.]

by the deed from Pitman to Spencer had never, prior to this trial, been submitted to a jury; that affiant knows that one of the first

W. A. Kinney. ^ two jury trials went off on a non-suit given in favor of the defendants, and is further informed

W. A. Kinney. that the trial, while there was some evidence of adverse possession, it was very slight, and that the question of title and adverse possession were sole

W. A. Kinney. the ^ issues involved in that first trial; that S. M. Ballou tried both the first and the second cases before a jury, for defendants: that the 3rd, 4th and 5th trial of said cause have been participated in by affiant personally; that the question of the presumption of a lost deed and the question of the beach being an appurtenance as aforesaid, was not submitted to the at the 3rd trial

W. A. Kinney. jury ^ ; that at the 4th trial before Judge Gear adverse possession, presumption of a lost deed and

84 the question of appurtenances were all eliminated by the Court and the mere question of what was meant by "sea-beach" was the sole issue submitted to the jury; so that as a matter of fact the aforesaid issues of a presumption of a lost deed and the issue as to the beach being appurtenant to the land above the street in the trial this Term

W. A. Kinney. went to the jury for the first time ^ . That defendants have spent over $2,000 in the trial of this last suit alone, over $1200 of which was spent for costs and witness fees, and affiant affirms that defendants have not yet, and in this last trial have not had a fair and impartial trial of the issues raised under the pleadings and under the evidence, and which were covered by the Judge's instructions, owing to the importance and weight that must necessarily — been attached to the Judge's remarks as above referred to and owing to the instructions that the plaintiff had shown a perfect legal title to the Bates piece as well as the Kalailoa Kuleana, whereby the issue as to what was meant by "sea-beach" in the deed to Pitman and the issue as to the beach being appurtenant to the mauka land were necessarily eliminated.

That affiant concedes now as at all times heretofore that the remarks by the Court were inadvertent and that the Court has done all in its power to overcome any prejudice to defendants' case or handicap upon them by reason of his remarks; affiant

W. A. Kinney. affirming nevertheless that [as]* the action of

W. A. Kinney. the Court, [and]* notwithstanding all the efforts of the Court to avoid any injury to defendants'

W. A. Kinney. cause, [it]* as a matter of fact could not help being a great factor in the trial of that case and in nullifying the attempts of counsel for the defendants to secure before the jury the full benefit of all the evidence adduced by him at the enormous cost for witnesses hereinabove set forth.

85 And further affiant sayeth not.

W. A. KINNEY.

[* Words enclosed in brackets erased in copy.]

Subscribed and sworn to before me this 28th day of March, 1906.

[NOTARIAL SEAL.] GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

Endorsed: Law No. 5037/8. Circuit Court, First Circuit, Territory of Hawaii. C. A. Brown, Plaintiff, *vs.* J. D. Spreckels Bros. *al.*, Defendants. Reply aff. of W. A. Kinney. —— ——, Judge. iled March 29th, 1906, at 9:6 A. M. Job Batchelor, Clerk. Kinney, McClanahan & Cooper, 303-305 Judd Bldg., Honolulu, Attorneys for —— —— (Office No. —).

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, 1906.

Law. No. 5037.

CHARLES A. BROWN, Plaintiff,
vs.
OHN D. SPRECKELS and ADOLPH B. SPRECKELS, Partners, Doing Business under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Defendants.

Ejectment.

eply Affidavit of S. M. Ballou on Defendants' Motion for a New Trial.

IONOLULU, *County of Oahu, Territory of Hawaii, ss:*

S. M. Ballou being first duly sworn on oath deposes and says:

That he was and is associate counsel with W. A. Kinney in the bove entitled cause; that he has read the affidavits of the jurors led on behalf of the plaintiff in the above entitled cause; that either on the day following the verdict in said cause, or the next day, affiant met H. P. Benson, one of the jurors in said cause, and said to said Benson in substance—"don't you think that that publication of the Judge's remarks in the newspaper had a great deal of effect on the jury?" to which said Benson replied—A thing like that cannot help having some influence."

Affiant further states that he conducted the first trial of said cause Hilo, which resulted in a disagreement of the jury, and also the econd trial of said cause in Hilo, which resulted in a non-suit, which as afterwards reversed by the Supreme Court; and was present as ssociate counsel at the trial of said cause before Judge Gear, and at he trial at the present term before Judge De Bolt; that at neither f the trials in Hilo was the doctrine of the presumption of a lost rant alluded to or submitted to the jury, nor was the question of hether or not the land in controversy, or any of it, had been so

used and enjoyed as to pass as an appurtenance, submitted to the jury, nor was either of said questions submitted to the jury at the trial before Judge Gear, the defendants' instructions concerning a lost grant being refused by Judge Gear, who also took from the jury the question of adverse possession.

And affiant further says that in settling the instructions before Judge De Bolt in the trial of said cause at the present term and before the same were given to the Jury, affiant made a long argument against the giving of such of the plaintiff's instructions as were given and excepted to, and that in particular as regards exceptions 2 and 5 affiant claimed that the same were not only eroneous but were in direct contradiction to defendants' instructions 10, 11
S. M. B. and 12, which the Judge had stated that he would give, that
R. W.A. [but]* after the argument had been made and the instructions settled and the Court about to adjourn for a
88 short recess prior to calling in the jury, affiant again requested the Court to consider carefully during argument of counsel and over night his contention that said instructions were absolutely inconsistent.

And further affiant sayeth not.

S. M. BALLOU.

Subscribed and sworn to before me this 29th day of March, A. D. 1906.

[NOTARIAL SEAL.] R. W. ATKINSON,
Notary Public, First Judicial Circuit.

Endorsed: L. 5037/8. C. A. Brown *v.* J. D. Spreckels *et al.* Reply Affidavit of S. M. Ballou on Defendants' Motion for a New Trial. Filed March 29, 1906, at 9:8 o'clock A. M. Job Batchelor, Clerk.

89 In the Circuit Court of the First Circuit, Territory of Hawaii, January, A. D. 1906, Term.

C. A. BROWN, Plaintiff,
vs.
J. D. SPRECKELS ET AL., Defendants.

Ejectment.

Oral Opinion.

In this matter the court wishes first to express its appreciation for the very able, thorough and careful manner in which the motion has been presented and argued on both sides.

The motion and facts disclosed by the record present a somewhat novel and peculiar question. I will first address my attention to the

[* Words enclosed in brackets erased in copy.]

facts disclosed by the record, which, together with the recollection of the court as to some facts will serve as a basis for the conclusion reached. It appears from the record that this case began on the 12th day of February of this year and reached a termination, so far as the evidence was concerned, on March the 7th. At this point in the case (10:27 A. M.) counsel for plaintiff, presented, and, upon the jury being excused until 2 P. M., proceeded to argue a motion for a directed verdict. Counsel's argument proceeded perhaps for thirty or forty minutes. He was presenting the matter very clearly and very ably, but he was simply passing over the same ground that I had been going over in following the case during the trial. In fact, as I have already remarked, I had carried this case home with me every night, had it with me on the car coming and going,
90 considering the various features involved, and it seemed to me that it was impossible, from my view of the matter, to grant the motion, and to permit further argument of counsel was simply a waste of time. Realizing the further fact that to stop counsel in the course of his argument and then to decide against him was a state of facts that called for some explanation on the part of the court;—it was due counsel to explain to him why the court had decided to stop him in his argument and then decide against him. That was the occasion of the remarks of the court, which has turned out to be the chief point in consideration in the case.

As I now recall the facts, Mr. Lightfoot's argument was closed some little time before the noon hour, somewhere between half-past eleven and 12 o'clock. The court in making the remarks, the jury having been excused at 10:27 A. M., as already stated and feeling that no one was in the court-room except counsel and perhaps one or two others, and particularly feeling that there was no newspaper reporter present, felt that the remarks were made, as counsel for defendants later remarked in confidence and for the purpose of apprising counsel of the attitude of the court or the view the court had of the case.

No recess for lunch was taken at 12 o'clock but the court continued during the noon hour, from 12 to practically 2 o'clock considering the instructions to be given to the jury, the jury having been excused, as I have already stated, until 2 o'clock in the afternoon. At 2 o'clock the jury returned, took their seats in the jury box; counsel for defendants, Mr. Kinney, then proceeded with his argument, continuing up to within six minutes of the allotted time, namely two hours, which the court had previously fixed as the time for argument, when he asked that the court take an adjournment and that he would reserve his six minutes for the following
91 morning. That was agreeable to all parties as well as the court. But, a few minutes prior to this, however, somewhere from 15 minutes to perhaps half an hour, I could not give the exact time, the bailiff of this court brought to the bench a copy of the Evening Bulletin containing the remarks of the court now made a part of the records herein. I glanced at it hurriedly, saw what it was and of course I was very much surprised to know that the matter had reached the papers, and immediately upon Mr. Kinney taking

his seat I proceeded to admonish the jury as I believe I had almost every day during the progress of the trial. I remember particularly on the evening in question of giving the usual admonitions and closing with the following remarks—I wish to say, however, before stating the remarks, that I will have to make this finding as to what the court said upon the record and upon my best recollection of what was said. There is absolutely no doubt in my mind that I was proceeding to instruct the jury not to read the papers of that evening or of the next morning. That, I am absolutely certain that I had in mind, and I can say almost without doubt that I did so state to the jury. That being my recollection of what I said, together with the affidavits that are now on file, I am bound to find as a matter of fact that the court did instruct the jury at that time not to read the papers of that evening or of the next morning, but to lay them aside and read them later.

The court got no further in its instructions than I have just stated when Mr. Kinney arose, made some remark first, which I did not catch,—I recognized his voice but as I now recall it, something like this: "Your Honor I presume refers to the article in the Evening Bulletin?" I do not pretent to say that those are the exact words, but something like that or to that effect, further stating, "We
92 do not ask for such an order. Let the jurors read the papers. We will take our chances," or words to that effect,—again I will not attempt to be precise or exact in the language. The court of course thereupon withdrew that part of the instruction to the jury, namely not to read the papers of that evening or the next morning, and as I understood it and as I felt throughout the balance of the proceedings, the jurors then, without any objection on the part of counsel for defendants, were at liberty to read all the papers of that evening as well as of the next morning.

The next morning when court convened, I believe it was nine o'clock, before counsel for defendant renewed his argument, Judge Stanley one of the attorneys for plaintiff, called the attention of the court to what had taken place the evening before regarding the publication, and the remarks of Mr. Kinney. Perhaps at this point it would be just as well for the court to state a little more particularly what occurred in addition to what has already been stated the evening before; Mr. Kinney, referred to the article appearing in the Evening Bulletin already alluded to, said—or words to this effect—"The hand that sniped that photograph, is the hand that put that article in the Evening Bulletin." This was resented by Mr. Magoon, some words passed between counsel, the court endeavored to quiet matters and immediately adjourned. As I was about to remark a moment ago, the next morning Judge Stanley called the court's attention to this matter, using language to the effect that counsel for plaintiff were under a cloud of suspicion by reason of the remarks of Mr. Kinney, the evening before, and asked that the matter be investigated and cleared up. Counsel, Mr. Kinney, was agreeable to this. The court was impressed with the idea at first that it was unnecessary, it was perhaps raising a side issue, something that was

not involved in the case particularly. I believe the court re-
93 marked, and I might say that all these proceedings of course were in the presence of the jury, using language something like this: "You gentlemen are trying to make a mountain out of a mole hill," but both parties seemed to be very earnest in their contentions and desirous of having an investigation. The court asked if the witnesses were present to proceed with the investigation, whereupon Mr. Kinney called the bailiff of the court and one of the reporters of the Evening Bulletin, and upon the close of the examination of Mr. Kinney of the Evening Bulletin remarked, "I am pleased to withdraw my remarks." Mr. Magoon immediately arose and seemed pleased and acknowledged the apology on the part of Mr. Kinney and offered apologies for anything that he might have said, and everything seemed smooth and serene.

I think the court at that time perhaps a little later after something else occurred, but think it was at that time, turned to the jury and instructed them to disregard the whole matter and not to be influenced by anything that had occurred or anything that counsel had said. I do not recall,—the record however will show that,—whether the court at that time admonished them as to the articles or not, I am not quite sure as to that. The case then proceeded, Mr. Kinney finishing his argument.

Mr. Magoon proceeded with his argument. I don't believe it improper to state what Mr. Magoon said:—If there is any objection to that going in the record I will not state it.

Mr. KINNEY: No objection.

The COURT: Mr. Magoon stated to the jury that he did not want them to be influenced in any way whatever by the remarks of the court which had been published in the papers; that he did not, as much as he desired a verdict for the plaintiff, want it in that
94 way, impressing upon them that he desired them to strictly and conscientiously observe their oath to render their verdict upon the law and evidence and disregard all such matters.

The Court instructed the jury at the close of the argument certain written instructions having been submitted by the respective parties were given,—most of them. Some were refused or modified, but at the close of the requested instructions the court of its own motion again turned to the newspaper episode and sought in every conceivable way, as it seemed to the court at that time, to bring to bear upon the minds of the jurors that they were to totally disregard the published remarks and impressing upon them that they were to render their verdict on the law and the evidence and not be influenced by any other matters.

With regard to the responsibility for the publication of the remarks of the court, it is quite apparent to me from the record and all the circumstances involved in the case that neither the plaintiff nor any of his counsel were in any way whatever responsible. The court of course did not entertain or have the remotest idea that these remarks would ever reach the jury, much less to appear in the public press. It did, however, and I don't know that it would serve any good purpose to seek to place the blame upon anyone, because that

would not change the fact. It was published and as I say, I will content myself with the fact that it was published and not seek to place the blame upon anyone, unless upon the court. It further appears from the statement of Mr. Kinney that he saw the Pacific Commercial Advertiser, the morning paper, the next morning before coming into court,—containing the remarks of the court which is also made a part of the record in this case.

95 Upon these facts the court is presented with the question whether or not the motion for a new trial should be granted or denied. It seems to me that one element, a very important element, to be considered in that connection is whether or not the verdict is just or unjust. Of course that is not the only consideration but that is one, and a very important one. I feel upon the evidence and having followed the testimony very closely, having observed every witness, his manner and attitude, and also that atmosphere that is bound to surround each and every case,—each and every case has its own peculiar atmosphere as distinct from all others,—considering all these matters, as I was about to remark, I am bound to say that I feel that the verdict was and is a just one.

I feel also upon the facts as disclosed by the record and the facts within the knowledge of the court which the court observed and which the court has considered, that if there was anything objectionable, that is anything prejudicial in the remarks as published, that it was waived by counsel. If the court had had its way I feel confident that the jurors would have obeyed the admonition of the court. They were intelligent, conscientious citizens, and I have not any doubt in my mind, although counsel seems to doubt the proposition, but that those jurors would have obeyed the admonition of the court and would have refrained from reading the newspapers of that evening and of the next morning. Be that as it may, it is very evident, however, that at the time the court was admonishing the jury and proceeding to instruct them not to read the newspapers, they had not up to that point read the remarks of the court and knew nothing of the publication. Now, it seems to me that there was no more occasion for counsel for defendants to say anything than

96 there was for counsel for plaintiffs to say anything, because, if the jurors had not up to that point read the newspapers, nor knew anything about the publication of the remark, they could not have gathered from the remarks of the court,—namely, not to read the papers of that evening or of the next morning,—that there was anything in the papers prejudicial to one side or the other, or if they could infer that there was anything in the papers prejudicial to one side or the other there was absolutely no way that they could infer which side it was in favor of or against.

So much for that phase of the question. There were other avenues open to counsel for defendants, and I appreciate the force of his argument that where one is called upon to act instantaneously upon an emergency presenting itself, as in this case, he is not always expected to adopt the best means or method of avoiding the difficulty; but be that as it may, the avenues were there, they were open.

The sole purpose and object of the court and the desire of counsel

on both sides, as it seems to me, in the interests of justice, was or should have been to keep this publication in the evening paper, or anything that might appear in the morning paper, regarding it from the jury. I was impressed with Mr. Lightfoot's argument upon this phase of the question, namely that counsel could have privately approached the court,—perhaps the court should have brought that to the attention of counsel,—to this effect, that we proceed with the case, Mr. Kinney's argument being practically closed, and Mr. Magoon could have taken up his argument at four, finished at six; the instructions could have been settled, and the whole case could have been submitted to the jury and possibly the jury would have decided and disposed of the matter that evening without ever having had an opportunity of seeing the papers. I call your attention to this
97 opportunity, an avenue that was open, not in the sense of criticising counsel for defendants because as I say we must realize the principle that one suddenly called upon to act may not always do the proper thing, but there was the way open. There was still another way under Act 75 of the Laws of 1905. The court, in the language of this act, may, in its discretion, order and direct the trial jury in any case, civil or criminal, to be segregated, locked up or otherwise confined, after being finally accepted and sworn to try the case and until a verdict is arrived at or the jury discharged. This matter could have been brought to the attention of the court and the jury would not have known which side brought it to the attention of the court. I do not think, as counsel has intimated in his argument, that it would be undignified or improper to have secretly attempted to keep this matter from the jury. I do not look at it that way. In all the affairs of life we have to be governed by circumstances. We must adapt ourselves to circumstances. If we are placed in a peculiar situation we must act according to the circumstances. Now here was a trial that had consumed practically four weeks, involving valuable property, and as counsel has stated, a great deal of money had been expended, and I wish to say also that the case had been very carefully and thoroughly presented from both points of view and had been thoroughly covered, and in an emergency and under circumstances such as those mentioned, I think it would have been perfectly proper and the court would have been justified in directing the jurors to be locked up if counsel did not wish to complete the case that night. I do not see how that could have prejudiced the jury against either side, because they need not have known from which side the request came to the court. Neither of these courses being pursued the next morning, possibly,
98 counsel could have moved for a mistrial, possibly could have moved for a mistrial before I will pass that over merely by mentioning it. Mr. Magoon in his argument contends that the remarks of the court were not comments upon the facts; that they were a mere statement of the law upon the presentation of the argument on the motion for a directed verdict. The court was bound to presume, as he contends, that all the evidence adduced by the defendants must be taken as true, with all reasonable and proper inferences flowing therefrom, and that the remarks of the court in overruling

the motion were not a comment upon the weight or credibility of the evidence, but that the facts thus established by the evidence did not justify the court, as a matter of law, in granting the motion. I am impressed with that argument but I deem it unnecessary to determine the matter.

There is another feature of the case which presents itself to me, that is to say: Assuming, without holding, that the remarks were comment upon the facts and evidence; and also, assuming, without holding that the court could have made the same remarks directly to the jury. In other words, under the rule as it existed at common law, the court would lay down the law to the jury and also advised them as to the facts. We all know that in England and in many of the states prior to the enactment of statutes that the court always expressed its view upon the evidence, and advised the jurors as to the facts, but with that of course always instructed the jury that they could disregard the advice of the court as to the facts and evidence and decide the case according as they thought justice and truth might require.

Mr. Justice Brown, who recently retired from the Supreme Court of the United States, in an address, entitled: "More Justice and less Technicality," read before the Georgia Bar Association at
99 Atlanta, August 7, 1888, touching this question, said (23 A. L. R. p. 53-4): "In conclusion, I wish to appeal first for a reformation of the jury system. No one, I suppose, thinks seriously of abolishing it, especially in criminal cases. I make no mention of minor reforms. I do not venture to suggest whether in certain cases majority verdict might not be substituted for unanimous verdicts. But I appeal for the restoration of trial by jury as it existed at common law; for a restoration of the system under which the judge, in charging the jury, sums up the evidence and aids them with his trained opinion and experience as to the value of different elements of it; not hesitating, where he is not in doubt, to express his own opinion upon the weight of it; cautioning them, at the same time, that they are at liberty to exercise a judgment independent of his; subject, in case of error or partiality, to correction in a higher court upon a bill of exceptions. This system exists in England, in all Federal courts, and it has been retained in several of our State courts conducive to greater certainty and justice than the system of hypothetical written instructions which obtains in other American jurisdictions. The jury would gladly have this aid from the judge; society is entitled to it; the innocent are entitled to it; and it ought not to be withheld, merely because, by withholding it, guilty persons may acquire additional chances of escape."

It seems to me that the observations of this able jurist are full of common sense, and along a line that would be highly proper to follow in many cases. Presumably a trial Judge, by reason of his legal training and experience is better fitted to discover the truth than inexperienced jurors although ever so intelligent. We can see that if such a course were pursued there could be no injustice in it.
100 If the judge, by reason of his experience and his knowledge of the law, is thus better able and better fitted to discover the

real question in the case, to see how the case should go, why should it not go that way?

Under the title "Judicial Independence," is an article also written by this able man, (*Id.* page 781,) reading from pages 787, 788, 802 and 803, as follows: "The question, however, which concerns us most directly in this connection is, whether the judge is a constituent part of a jury trial at common law. I have never seen nor heard of a jury trial in which there was not a judge who presided and took a more or less active part, and yet in the ordinary definitions of jury trial given by the lexicographers and elementary writers, he is ignored as completely as if he were a mere supernumerary. Even the judges themselves seem to assume that it is only the jury and the parties to the suit who are entitled to the constitutional protection. The question is one of no little importance. If the judge be the mere spokesman of the law, he is bound to a blind obedience to the will of the legislature, in all that concerns the trial; on the other hand, if he be an indispensable and constituent factor in that proceeding known to the law as trial by jury, it is difficult to see why he is not as much entitled to protection against legislative interference in the discharge of his common-law duties, as is the jury in the exercise of its proper functions. There is a definition of trial by jury in a recent case in the Federal Supreme Court, which is pertinent in this connection: "Trial by jury," says Mr. Justice Gray, "in the courts of the United States, is a trial presided over by a judge, with authority not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury
101 by explaining and commenting upon, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination." Now, trial by jury in the courts of the United States is neither more nor less than trial by jury at common law, as it existed at the adoption of the constitution, and if the above language be taken not as mere rhetoric, but as a judicial definition of trial by jury, it would necessarily follow that the functions of the judge therein specified, are as "inviolate" as those of the jury.

These remarks are suggested by a series of statutes which have become fashionable in the Southern and Western States (for there are fashions in legislation, and even in judicial opinion, as well as in dress), the object of which is apparently to secure the unbiased and unadvised opinion of the jury upon the facts, and an easy and accurate settlement of bills of exceptions; but the effect of which is to shear the judge of his proper magisterial functions and to reduce him to the level of a presiding officer, or the mere mouth-piece of counsel. These statutes are of the following classes: Then follows an enumeration of the statutes alluded to. Now passing to pages 802 and 803 "Jurors, as a rule, desire the advice of the judge and watch eagerly for any intimation of his opinion upon the facts. Why should they be denied the benefit of his experience and counsel. Simply because the statutes to which I have referred say that

they shall, and that the power of the judge shall be limited to reading bald instructions to the jury. In my opinion this is a grave error, and one that is likely to create such profound distrust with the whole system as to result in a complete reformation or in its abandonment. Indeed, it is safe to say that if trial by jury shall come to and end in this country, it will perish in the house of its friends."

102 It also seems that our supreme court has very decidedly intimated that such is the law in this Territory. In the case of the Territory against Schilling, 17 Haw., 264, the court uses the following language relative to a remark made by Judge Hardy, citing cases by the Supreme Court of the United States seemingly with approval: "We do not think, however, that the remark of the court concerning this testimony, although perhaps open to criticism, is likely to have affected the result or requires a reversal of judgment. If the statutes required, as we do not think that it does, a reversal of judgment for any comments whatsoever made by the court upon the evidence, then it would be requisite to consider whether the statute is constitutional in limiting the right of a common law trial by jury. The U. S. Supreme Court has frequently held in reference to suits at common law under the 7th amendment, that trial by jury requires the superintendence of a judge empowered to instruct them on the law and to advise them on the facts. Capital Traction Co. *v.* Hof., 174 U. S. 14. See also: Nudd, *et al.*, *v.* Burrows, 91 *Ib.* 439; Vicksburg &c. R. Co. *v.* Putnam, 118 *Ib.* 553; U. S. *v.* Reading R., 123 *Ib.* 114.

The motion for a new trial is overruled.

J. T. DE BOLT,
First Judge.

As of March 30th, 1906.

Endorsed: L. 5038. Circuit Court First Circuit. Territory of Hawaii. C. A. Brown, Plaintiff, *vs.* J. D. Spreckels, *et al.*, Defendants. Ejectment. Oral Opinion. Filed April 4th, 1906. At 8:40 o'clock A. M. Job Batchelor, Clerk.

103 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, January Term, 1906.

Law. No. 5037.

CHARLES A. BROWN, Plaintiff,

vs.

JOHN D. SPRECKELS and ADOLPH B. SPRECKELS, Partners, Doing Business under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Defendants.

Ejectment.

Judgment.

This action by petition claiming two certain pieces of land situate at Hilo, Island, County and Territory of Hawaii hereinafter more particularly described as Lot A. and Lot B. came to the January 1900 Term of the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, and thence by certain continuances and orders of Court to the present term of the Circuit Court of the First Judicial Circuit when the parties appeared and were at issue to the jury.

Said cause having been heard and committed to the jury, they find for the plaintiff.

Therefore it is adjudged that the plaintiff recover of the defendants.

104 *First.* That certain piece or parcel of land situate in Hilo, Island, County and Territory of Hawaii, being a portion of the land conveyed by Kamehameha III to Elizabeth G. I. Bates by deed dated the 19th day of September 1853, and recorded in the Registry Office Oahu in Liber 5, page 587 and more particularly bounded and described as follows:

Beginning at the present South corner of Front St. Waianuenue St., the said point being the original North angle of the lot conveyed by B. Pitman to Thos. Spencer, Lib. 13 Folio 384, the boundary runs by the true meridian.

1 S. 24° 48′ E. 192.0 ft. along the West edge of Front St. to E. angle this piece

2 N. 65° 12′ E. 186.0 ft. along accreted extensions to point at sea beach at low water mark, thence following around the line of said sea beach at low water mark (1899) by a curve to the left of radius of 251.5 ft. the direct bearing length of chord being

3 N. 12° 41′ W. 232.0 ft. thence

4 S. 56° 48′ W. 238.0 ft. along the line of accreted extensions on the North line of the Bates property to point of beginning.

Containing an area of 39639 sq. ft. more or less, reserving however therefrom the area now occupied as a public roadway and known as Front St.

Second. That certain piece or parcel of land situate at Hilo, Island, County and Territory of Hawaii, being a portion of the land described in Royal Patent 4894, Land Commission Award 1144, and more particularly described as follows:

Beginning at the North angle of lot described in deed from B. Pitman to Thos. Spencer lib. 13 folio 384, the boundary runs by the true meridians,—

1 S. 23° 25′ E. 22 ft. to East angle.
2 N. 67° 10′ E. 92 ft. to East angle of Kong Hip Chan Building.
3 N. 22° 50′ W. 28 ft. to North line of accreted extension of L. C. A. 1144, this property,
4 S. 65° 20′ W. 92 ft. along same to point of beginning.

Containing an area of 2300 sq. ft. more or less, reserving however the area now occupied as a public roadway, known as Front
105 Street.

And it is further adjudged that the plaintiff recover of the defendants his costs taxed at $1338.00.

By the Court:
(Signed) JOB BATCHELOR, *Clerk.*

May
J. B. Entered this 3rd day of [March]* 1906, as of the January Term, 1906.

Endorsed: L. 5037. First Circuit Court Territory of Hawaii. In Term. Charles A. Brown, Plaintiff *vs.* J. D. Spreckels, *et al.*, Defendants. Judgment. Filed March 16th, 1906, at 9:30 o'clock A. M. Job Batchelor, Clerk. Magoon & Lightfoot, Magoon Building, Honolulu, Attorneys for Plaintiff.

106 In the Circuit Court, First Circuit, Territory of Hawaii.

224. Law. 5038.

CHARLES A. BROWN
v.
J. D. SPRECKELS BROS. ET ALS.

Dated Monday, February 12th, 1906.

De Bolt, J.

Clerk's Minutes.

Messrs. Magoon & Lightfoot and Holmes & Stanley for Plaintiff.
Messrs. Kinney, McClanahan and Cooper and Ballou & Marx for Defendants.
Mr. J. L. Horner, Stenographer.

Mr. Magoon made a statement *re* papers and records having been lost, and stated that an agreement had been reached with the de-

[* Word enclosed in brackets erased in copy.]

fendants' counsel on the procedure in the trial of these suits, and reads two stipulations, filing same.

The following jurors were drawn and sworn on their *voir dire.*

H. P. Roth,	Frank Darling,	Chas. H. Pfeiffer,
R. H. P. Lishman,	Jas. E. Jaeger,	A. M. Mellis,
John K. Isaac,	B. F. Beardmore,	Geo. F. Fuller,
J. W. McDonald,	W. Barclay,	J. D. Tucker.

By mutual consent of counsel, H. P. Roth was excused by the Court and F. W. Chase was drawn and sworn.

Mr. Magoon moved that Juror B. F. Beardmore be excused for cause, Court overruled the motion, exception taken and allowed.

Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

All same parties present.

Mr. Magoon moved that the court reconsider its decision
107 on the motion *re* juror B. F. Beardmore, and argues.

The Court reconsidered the decision and excused B. F. Beardmore as being disqualified. Exception was taken by defendant and allowed, whereupon Wm. Buckle was drawn and sworn.

Mr. Kinney moves that Mr. Abraham G. Kaulukou be entered as associate counsel for defendants.

Wm. Barclay was excused by the Court as being disqualified whereupon Henry P. Benson was drawn and sworn.

By mutual consent of counsel Edward Drew was excused and J. Mitchell was drawn and sworn.

Plaintiff peremptor-y challenged John K. Isaac who was excused by the Court thereupon E—— was drawn and sworn.

Defendant peremptor-y challenged Frank Darling on the part of def't J. D. Spreckels, who was excused by the Court, whereupon Chas. Butzke was drawn and sworn. Mr. Magoon excepts to this challenge, exception allowed.

Plaintiff peremptor-y challenged J. D. Tucker, who was excused by the Court, whereupon Geo. H. Cowan was drawn and sworn.

Defendant peremptor-y challenged Chas. Butzke who was excused by the Court.

The jury now being exhausted, the court ordered a special venire for 26 talesmen issued forthwith returnable at 10 A. M. Tuesday Feb. 13th to try the above entitled cause.

The following talesmen were duly summoned and appeared in Court.

Gerald Hughes,	Geo. W. Farr,	Thos. Kinslea,
John H. Drew,	Thos. Wilson,	Frank Atherton,
A. G. Kannegisser,	Louis Marks,	Henry W. Doane,
W. M. Buchanan,	Chas. F. Merrifield,	

108 Wentworth M. Buchanan was drawn and sworn, and was excused by the Court by mutual consent of counsel, whereupon Thos. Wilson was drawn and sworn.

By mutual consent of counsel Thos. Wilson was excused by the Court, whereupon John H. Drew was drawn and sworn, by mutual consent of counsel John H. Drew was excused by the Court, whereupon A. G. Kannegisser was drawn and sworn.

Plaintiff peremptor-y challenged A. G. Kannegisser who was excused by the Court; whereupon Frank Atherton was drawn and sworn.

Defendant peremptor-y challenged on behalf of Adolph Spreckels, J. W. McDonald, who was excused by the Court, whereupon Thomas Kinslea was drawn and sworn, plaintiff takes exception to this challenge, exception allowed.

Louis Marks was excused by the Court counsel consenting, as being disqualified, having been a juror on the case at a former trial.

Counsel consenting, Thomas Kinslea was excused by the Court on account of illness, whereupon Henry W. Doane was drawn and sworn.

The jury now being declared satisfactory by both parties were duly sworn to try the cause, and are as follows:

Chas. H. Pfeiffer,	R. H. P. Lishman,
James E. Jaeger,	A. M. Mellis,
Wm. Buckle,	Geo. H. Cowan,
Henry P. Benson,	T. W. Chase,
J. Mitchell,	Frank C. Atherton,
Henry W. Doane,	Geo. C. Fuller.

109 In the Circuit Court, First Circuit, Territory of Hawaii.

224. Law. 5038.

C. A. BROWN
vs.
J. D. SPRECKELS ET ALS.

Dated Monday, February 12th, 1906.

De Bolt, J.

Clerk's Minutes Continued.

Mr. Lightfoot reads complaint and addressed the jury at length, showing the location of the property in question on a blackboard.

Court orders all witnesses be excluded from the court room during the trial.

Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

Jury, counsel and all same parties present.
Mr. Lightfoot continues argument.
Mr. Kinney addressed the jury.
Chas. H. Merriam, sworn.

Plaintiff at this time called upon defendants to produce a certain deed, defendant did not produce the deed asked for.

Witness Merriam read a certain deed from Record of Conveyances Vol. 5 on page 587.

Copy of a deed was put in evidence and marked plaintiff's Exhibit A.

C. H. Merriam reads a deed from Record of Conveyances, Vol. 10 on page 544.

Copy of deed, was put in evidence and marked Plaintiff's Exhibit B.

110 Defendants move to strike out the evidence *re* deeds, and argues. Plaintiff argues. Motion overruled. Def't excepts. Exception allowed. C. H. Merriam reads deed from Record of Conveyances, Vol. 198, page 287.

Court adjourned at 4:6 P. M. until Wednesday Feb. 14 at 10 A. M.

Wednesday, Feb. 14th, 1906, 9.30 A. M.

Jury, counsel and all same parties present.

Mr. Ballou argued on Form of Deed.

Mr. Magoon argues. The Court excused the jury at 10:45 A. M. until 2 P. M. to allow counsel further time for argument.

Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

Jury, counsel, and all same parties present.

The Court overrules the objection to the entrance of a deed in evidence. Exception taken and allowed.

A certified copy of Royal Patent No. 1144 was put in evidence and marked Plaintiff- Exhibit E.

A certified copy of L. C. Award was put in evidence and marked Plaintiff- Exhibit D.

C. H. Merriam resumed the stand and reads from Vol. 6 page 387 in Land Registration Record.

Admissions, dated Feb. 14th, 1906, *was* put in evidence and marked Plaintiff's Exhibit F.

A copy of a map No. 1061 was put in evidence and marked Plaintiff's Exhibit G.

A copy of a map, No. 1062, was put in evidence and marked Plaintiff's Exhibit H.

A copy of a map, No. 1561 was put in evidence and marked Plaintiff's Exhibit I.

111 A copy of a map No. 2210 was put in evidence and marked Plaintiff's Exhibit J.

A copy of a map No. 1719 was put in evidence and marked Plaintiff's Exhibit K.

Mr. Lightfoot reads testimony of the late Mrs. Mary Ailau at the trial before Judge Gear from transcript of evidence commencing at page 57 and ending on page 68, direct examination.

Cross examination of same witness was read by Mr. Kinney, com-

mencing on page 68 closing at page 83. Redirect of same witness was read by Mr. Lightfoot on page 83 closing at page 84.

Court adjourned at 3:50 until Thursday Feb. 15th at 10 o'c'k.

Thursday, Feb. 15th, 1906, 10 A. M.

Jury, counsel and all same parties present.

Fred'k S. Lyman, sworn.

Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

Jury, counsel and all same parties present.

A deed dated Aug. 2nd, 1899, was put in evidence and marked Plaintiff's Exhibit C.

F. S. Lyman, resumed the stand.

Court adjourned at 4:8 P. M. until 10 A. M. Friday 15th.

Friday, Feb. 16, 1906, 10 A. M.

Jury, counsel and all same parties present.

Mr. Magoon made a statement *re* admissions made by counsel for both parties.

Plaintiff rests.

Transcript of evidence was put in for identification, naming those parts relating to the evidence of Mary Ailau and others.

112 Mr. Ballou at this time moves for a non-suit on several grounds.

Court overrules the motion. Exception taken and allowed.

B. H. Brown, sworn.

Witness retires from the stand while his evidence at a former trial was read by Mr. Kinney from transcript of evidence closing at page 155.

Mr. Lightfoot reads cross-examination of same witness from transcript beginning on page 155, skips pages 160, 161, 162 and continues on 163.

Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

All same parties present.

Mr. Lightfoot resumes reading the evidence from transcript of B. H. Brown closing on page 187.

Mr. Ballou on redirect beginning on page 187 ending on page 191.

113 In the Circuit Court, First Circuit, Territory of Hawaii.

224. Law. 5038.

C. A. BROWN
vs.
J. D. SPRECKELS ET ALS.

Dated Friday, Feb'y 16th, 1906.

De Bolt.

Clerk's Minutes Continued.

B. H. Brown resumed the stand at 2:40 P. M., witness retired from the stand. A Power of Attorney dated June 24th, 1861 was put in evidence and marked Defendant Exhibit 1. B. H. Brown resumed the stand. Court adjourned at 4 o'c'k P. M. until 10 A. M. Monday Feb. 19th.

Monday, Feb. 19, 1906, 10 A. M.

Jury, counsel and all same parties present.
B. H. Brown resumed the stand.
Court adjourned at 11:55 A. M. until 2 o'c'k P. M.

Afternoon Session, 2 P. M.

Jury counsel and all same parties present.
B. H. Brown, resumed the stand.
Court adjourned at 4 o'c'k P. M. until Tuesday Feb. 20th, at 10 A. M.

Tuesday, Feb. 20, 1906, 10 A. M.

Jury, counsel and all same parties present.
B. H. Brown resumed the stand.
A photograph of Hilo water front was put in evidence and Marked Plaintiff's Exhibit "L."
A photograph of Hilo water front was put in evidence and marked Plaintiff's Exhibit M.
Wm. B. Nailima, sworn.
Court adjourned at 11:55 A. M. until 2 P. M.

114 Afternoon Session, 2 P. M.

Jury, counsel and all same parties present.
Wm. B. Nailima resumed the stand.
Court adjourned at 4:15 P. M. until Wednesday Feb. 21st at 10 A. M.

Wednesday, Feb. 21, 1906, 10 A. M.

Jury, counsel and all same parties present.
Wm. B. Nailima resumed the stand.
Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

All same parties present.
A bound vol. of commercial advertiser was put in and an advertisement under date of October 4th, 1860 was read as defendants' evidence 2 (Vols. No. 13) advertisement notice of disposition of business under date of Dec'r 20 1860 was put in as defendants' evidence and known as Exhibit 3.
A deed dated Jan'y 1st 1861 was put in evidence and marked defendants' Exhibit 4.
C. H. Merriam recalled.
A certificate, No. 275 Equity, Supreme Court Record was put in evidence and marked defendants' Exhibit 5.
A Deed was read by witness C. H. Merriam from Vol. 66 L. R. Record page 337 as defendants' evidence 6.
A Deed in Liber 92 page 155 was read by same witness as defendants' Exhibit 7.
Mr. Kinney reads evidence of J. Reinhardt from transcript of evidence beginning on page 240 closing at page 241.
Mr. Kinney also reads examination on rebuttal of J. Reinhardt from transcript beginning at page 228 ending at 229.
B. H. Brown recalled.
Court adjourned at 4 P. M. until Friday Feb. 23rd at 10 A. M.

115 Friday, Feb. 23, 1906, 10 A. M.

Jury, counsel and all same parties present.
W. B. Kailimai, recalled.
John T. Brown, sworn.
F. S. Lyman, recalled.
John H. Maby, sworn.
W. C. Borden, sworn.
J. Maka, sworn.
Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

Jury, counsel and all same parties present.
J. Maka resumed the stand.
Court adjourned at 4 P. M. until Monday Feb. 26th at 10 o'c'k A. M.

Monday, Feb. 26, 1906.

Jury, counsel and all same parties present.
J. Maka resumed the stand.
C. A. Brown, sworn.
Malulani, sworn.
Court adjourned at 11:55 until 2 P. M.

Afternoon Session, 2 P. M.

Jury, counsel and all same parties present.
Malulani resumed the stand.
H. Willfong, sworn.

Tax Book for each year from 1859 to 1884 both inclusive were put in evidence and marked Defendants' Exhibit from No. 8 to 33.

A statement of tax returns dated March 12th, 1902, was put in evidence and marked Defendants' Exhibit 34.

Court adjourned at 4:20 P. M. until Tuesday Feb. 27th at 10 A. M.

116 Tuesday, Feb. 27, 1906, 10 A. M.

Jury, counsel and all same parties present.

James Kelliheleua, sworn.

A photograph of above witness was put in evidence and marked defendants' Exhibit 35.

Court adjourned at 11:50 A. M. until 2 P. M.

Afternoon Session, 2 P. M.

Jury, counsel and all same parties present.

James Kieliiheleua, resumed the stand.

Court adjourned at 4:17 until Wednesday Feb. 28th at 10 A. M.

Wednesday, Feb. 28, 1906, 10 A. M.

Jury, counsel and all same parties present.

James Kieliiheleua resumed the stand.

S. M. Ballou sworn.

Chas. H. Merriam recalled.

Leases read from record 13 folio 383 of Registry of Conveyances as defendants' Evidence 36.

A Deed was read from record 13 folio 383 as defendants' Evidence 37.

Court adjourned at 11:55 until 2 P. M.

117 In the Circuit Court, First Circuit, Territory of Hawaii.

224. Law. 5038.

C. A. BROWN

vs.

J. D. SPRECKELS ET ALS.

Dated Thursday, [March 1st,]* 1906.

February 28th, 1906.

De Bolt, J.

Clerk's Minutes Continued.

Afternoon Session, 2 P. M.

Jury, counsel and all same parties present.

Luther Severance, sworn.

Deeds recorded in Registry of Conveyances as follows was read by title giving number of Record, page and date.

[* Words enclosed in brackets erased in copy.]

Deed in liber 33 page 67, June 6th, 1871;
" " " 36, " 430 Feb. 17, 1873;
" " " 38, " 26 Ap'l 23, 1873;
" " " 40, " 74 M'ch 10, 1874;
" " " 41, " 223 June 16, 1873;
" " " 41, " 224 Jan'y 18, 1875;
" " " 42, " 58 Jan'y 18, 1875;
" " " 42, " 118 Feb. 16, 1875;
" " " 43, " 59 Jan'y 18, 1875;
" " " 43, " 218 Aug. 25, 1873;
" " " 45, " 223 M'ch 13, 1876;
" " " 48, " 51 M'ch 1, 1875;
" " " 48, " 209 Jan'y 18, 1875.

as defendants' Evidence known as 38.

A Deed dated Sep. 19th, 1899 was read by Mr. Ballou and was put in evidence and marked Defendants' Exhibit 39.

John T. Brown, recalled.

Court adjourned at 3:50 P. M. until Thursday March 1st at 10 A. M.

118

Thursday, Mar. 1, 1906, 10 A. M.

John T. Brown, recalled.
F. S. Lyman, recalled.
Capt. John C. Cluney, sworn.
Court adjourned at 11:55 A. M. until 2 o'c'k P. M.

Afternoon Session, 2 P. M.

Capt. John C. Cluney resumed the stand.

A photograph of Hilo water-front was put in evidence and marked Plaintiff's Exhibit N.

Defendant rests at 2:12 P. M.
G. W. Hapai, sworn on rebuttal.
Court adjourned at 4:15 until Friday M'ch 2 at 10 A. M.

Friday, Mar. 2, 1906, 10 A. M.

Jury, counsel and all same parties present.
G. W. Hapai, resumed the stand.
John Thomas Baker, sworn.
Court adjourned at 11:55 until 2 P. M.
All same parties present.
John Thomas Baker resumed the stand.
John H. Maby recalled by plaintiff on rebuttal.

A photograph of buildings in Hilo was put in evidence and marked Plaintiff's Exhibit O.

A photograph was put in evidence and marked plaintiff's Exhibit P.

An indenture dated Nov. 1st, 1879 was read by Mr. Lightfoot and put in evidence and marked plaintiff's Exhibit Q.

A photograph was put in evidence and marked plaintiff's Exhibit R.

A Lease dated Sept. 6th, 1881, was put in evidence and marked Defendants' Exhibit 40.

Court adjourned until 10 A. M. Monday March 5th.

119 Monday, Mar. 5, 1906, 10 A. M.

Jury, counsel and all same parties present.

John H. Maby resumed the stand.

Mrs. Makaleka Low, sworn.

W. C. Borden recalled by plaintiff.

C. M. White sworn and read from record of appointments of road supervisors, Island of Hawaii, 1870, to 1883, page 22.

Alexander Young, sworn for plaintiff.

Luther Severance, recalled by plaintiff for further cross-examination.

J. A. Magoon resumed the stand.

Doctor's certificate dated Feb. 8th, 1906 was put in evidence and marked Plaintiff's Exhibit S.

Doctor's certificate dated Feb. 15th, 1906 was put in evidence and marked Plaintiff's Exhibit T.

Luther Severance retired from the stand.

Luther Severance resumed the stand, and reads two accounts dated April 3rd to June 30th, 1885 and from July 1st to Sept. 26th, 1885, were handed in and filed for Identification by defendants.

Mr. Lightfoot reads R. A. Lyman's evidence at a former trial from transcript of evidence commencing on page 270 and finished at page 272 on direct examination.

Mr. Kinney read cross-examination of same witness commencing on page 272 finishing at page 277.

Mr. Lightfoot reads re-direct of same witness beginning at 277 finishing on same page.

F. S. Lyman recalled.

Court adjourned at 4:15 P. M. until Tuesday April 6th at 10 A. M.

120 Tuesday, Mar. 6, 1906, 10 A. M.

Jury, counsel and all same parties present.

F. S. Lyman resumed the stand on rebuttal.

Will of Thomas Spencer after being read by Mr. Lightfoot was put in evidence as plaintiff's Exhibit U, taken from Bankruptcy proceedings records, L. 1921.

Oath of Thomas Spencer taken from bankruptcy proceedings L. 1921 was read by Mr. Lightfoot as plaintiff's evidence and known as Exhibit V.

A protest dated Jan'y 20th 1881 of Thomas Spencer was read as plaintiff's evidence and known as Exhibit W.

121 In the Circuit Court, First Circuit, Territory of Hawaii.

224. Law. 5038.

C. A. BROWN
v.
J. D. SPRECKELS ET AL.

Dated Tuesday, March 6th, 1906.

De Bolt, J.

Clerk's Minutes.

Date of petition of Bankruptcy proceedings, Jan'y 17, 1881.
Date of answer to petition " Jan'y 24, 1881.
Date of decree " Feb. 14th, 1881.
Court adjourned at 11:55 A. M. until 2 o'c'k P. M.

Afternoon Session, 2 P. M.

All same parties present.
Opinion of Court in 4th Hawaiian page 452, date- Feb. 3, 1882.
Defendant- brief in suit, Minister of Interior *v.* J. D. Spreckels Bros., dated Aug. Term 1893, was put in for identification by plaintiff and known as X.
Patent No. 3739, Grant dated M'ch 7th, 1895, was put in evidence by plaintiff and known as Y.
H. P. Swinton, sworn.
Joseph A. Victor, sworn.
W. H. Kailimai, sworn.
Court adjourned at 4:15 until Wednesday at 10 A. M.

Wednesday, Mar. 7, 1906, 10 A. M.

Jury, counsel and all same parties present.
Mr. Magoon reads A. B. Loebenstein's testimony at the Kailua trial from transcript of evidence on re-direct at page- 18 and 20.
Mr. Kinney reads from transcript of evidence A. B. Loebenstein's testimony as above on page 16 on re-cross on pages 16, 17, 55,
122 56.
Chas. T. Warren, sworn.
Mr. Stanley reads from transcript of evidence of A. B. Loebenstein's testimony at the trial in Honolulu on rebuttal page 294.
Mr. Kinney reads from same transcript of evidence on page 295 of the testimony of A. B. Loebenstein.
Plaintiff closes on rebuttal at 10:27 A. M.
Defendant closes " " " same time.
Plaintiff moves for a directed verdict on several grounds. Jury was excused at 10:35 A. M. until 2 P. M.
Mr. Lightfoot argued on motion for a directed verdict.
Court overrules the motion.

Afternoon Session, 2 P. M.

All the same parties present.

Defendants moved for a directed verdict. Court overruled the motion.

Mr. Kinney addressed the jury commencing at 2:6 o'c'k P. M.

Court adjourned at 4:5 P. M. until Thursday M'ch 8th at 9 A. M.

Thursday, Mar. 8, 1906, 9 A. M.

Jury, counsel and all same parties present.

Mr. Stanley made a statement *re* remarks made by counsel for defendant at the close of yesterday's session. Mr. Kinney replied.

Mr. Magoon insists on an investigation.

C. A. K. Hopkins, sworn.

H. W. Kinney, sworn.

Mr. Kinney withdraws the statements made.

Mr. Kinney resumed his address to the jury at 9:24 A. M. concluding at 9:30 A. M.

123 Court addressed the jury *re* statement made by counsel.

Mr. Magoon addressed the jury at 9:39 A. M. concluding at 11:50 A. M.

Court reads instructions commencing at 11:50 concluding at 12:8 P. M. The Court continued to address the jury closing at 12:17. The jury retired at 12:20 and taken to lunch by the bailiff.

Plaintiff excepts to the modification of the following instructions of the plaintiff, Nos. 6, 7, 8, 9, 11, 14 and to giving such instructions as modified and excepts to the refusal to give plaintiff's instructions 10, 13, 15, 17, 18, 19, 20 and excepts to giving defendants' instructions 1, 2, 3, 9, 10, 11, 12, 15, 15*a*, 15*b*, 16, 17, 18, 19, 20, 21, *21*, 22, 23, 27, 28.

Defendants except to the court giving plaintiff's instructions 2, 3, 5, 6, 11, 12 and 14 and the refusal to give defendants' instructions 13, 14, 24, 25, 26, 29 and 30.

Court adjourned at 12:20 until 2:30 P. M.

Jury returned at 5:25 P. M. with the following verdict, we the jury in the above entitled cause find for the plaintiff.

Mr. Ballou counsel for defendants excepts to the verdict as being contrary to law and the evidence and to the weight of the evidence and gave notice of filing motion for a new trial.

The jury were excused for the term.

Court adjourned at 5:28 P. M.

JOB BATCHELOR, *Clerk.*

28 witnesses.

64 exhibits.

Endorsed: L. 5038. Clerk's Minutes. C. A. Brown *v.* J. D. Spreckels, *et al.* March 8th, 1906. Job Batchelor.

124 In the Circuit Court, First Circuit, Territory of Hawaii.

C. A. BROWN
v.
J. D. SPRECKELS ET AL.

Dated Friday, March 16, 1906.

De Bolt.

Clerk's Minutes.

Notice for Judgment *Non Obstante Veredicto.*

Mr. Ballou made a statement and moved for judgment *non obstante veredicto.* The Court denies the motion. Counsel for defendants excepts to the court's ruling, exception allowed.

Friday, March 23, 1906, 9 A. M.

Taxation of Costs.

Mr. Kinney made a statement *re* Bill of Costs and objected to several items. Mr. Magoon replied. Court continued the cause. Plaintiff to furnish defendants with a copy of the Bill of Costs.

Monday, March 26th, 1906, 9 A. M.

Notice of Request for Hearing Motion for New Trial and Affidavits of 12 Jurors.

Mr. Kinney made a statement *re* the time of having received notice of the above matter and moved the cause be continued until Thursday March 29th, at 9 A. M. Court grants the motion.

Thursday, March 29th, 1906, 9 A. M.

Motion for Taxation of Costs; Motion for a New Trial, &c.

Mr. Ballou orally moved to strike affidavits of the 12 jurors
125 from the files, on several grounds and reads affidavit of Henry P. Benson. Mr. Anderson reads authorities and argues.
The Court denies the motion to strike affidavits from files; exception by defendants taken and allowed. Mr. Kinney moved that all the portion of said affidavits of the 12 jurors beginning with the word "that" on third line of said affidavits be strick- out. Court denies the motion, exception taken and allowed.
Mr. Kinney reads motion to strike blank forms of judgment in cause No. 5038 from the files and argues.

J. Lightfoot, sworn;
Job Batchelor, sworn;
J. A. Magoon, sworn; S. M. Ballou, sworn.

The Court made a statement *re* what occurred March 16th regarding the presentation of judgments &c.

Mr. Magoon argues *re* stipulation. Mr. Kinney argues on same question. Mr. Anderson reads a late decision of the Supreme Court "Cotton Bros.," Mr. Magoon again argues. The Court grants the motion to strike judgment in second case from files. Plaintiff excepts; exception allowed. The Court also grants the motion to strike Bill of Costs in same cause.

The motion for a new trial in cause 5037 was now brought on by Mr. Kinney reading reply affidavit of W. A. Kinney.

Plaintiff moved to strike out the reply affidavit from files.

Court denies the motion, exception taken and allowed.

Mr. Kinney reads affidavit of S. M. Ballou *re* motion for a new trial and argues.

Motion for a new trial was now presented, reading of same was waived.

Mr. Kinney proceeded to argue, and quote authorities.

126 Court adjourned until Friday M'ch 30th at 9:30 A. M.

Friday, March 30th, 1906, 9:30 A. M.

Mr. Kinney made a statement *re* a statement he made in his argument yesterday in regard to an article published in the Advertiser, and proceeds to argue on the motion for a new trial. Mr. Anderson argues on the same motion, and quotes authorities.

Mr. Stanley argues against the motion.

Mr. Magoon also argues.

Mr. Kinney again argued.

The Court after making lengthy remarks overruled the motion for a new trial.

Mr. Kinney for defendants excepts to the Court's ruling, exception allowed.

Saturday, April 14th, 1906, 9 A. M.

Notice of Motion of Taxation of Costs and Motion for Judgment.

Mr. Kinney made objections to several items in the Bill of Costs and reads affidavit of W. A. Kinney. Clerk's Minutes "Dec'r 1903 Term" was put in evidence and marked "Plaintiff's Exhibit A."

C. A. Brown, sworn.

Thirty five (35) receipts were put in evidence and marked Plaintiff's Exhibit from B to A. 10.

J. Lightfoot, sworn.

J. A. Magoon, sworn.

Bill of Costs continued until Saturday April 21st, at 10 A. M. and motion for judgment until Tuesday April 17th, at 9 A. M.

April 17th, 1906, Tuesday.

Mr. Lightfoot answered ready to proceed in the motion for judgment.

127 Mr. Ballou read objection to motion for judgment and argued.

Court continued the cause until Thursday April 19th at 9 A. M.

128 In the Circuit Court, First Circuit, Territory of Hawaii.

C. A. BROWN
v.
J. D. SPRECKELS ET AL.

Dated Thursday, April 19th, 1906.

De Bolt, J.

Clerk's Minutes.

Motion for Judgment.

Court continued the above entitled cause until Friday April 20th at 9 A. M.

Friday, April 20th, 1906, 9 A. M.

Motion for Judgment.

Mr. Magoon made a statement *re* stipulation submitted by each party.

Court continued the cause until SaturdayApril 21st at 8:50 A. M.

Saturday, April 21st, 1906, 8:50 A. M.

Motion for Judgment.

Mr. Lightfoot filed three Wilder S. S. Ales.

Mr. Ballou filed stipulation and defendants' points on plaintiff's motion to allow plaintiff's bill of costs.

Mr. Magoon stated when on the stand last, that Mr. Brown had paid items of my account of the first and second trials at Hilo, that was a mistake, the amounts by some omission or error were not paid by Mr. Brown, they still stand on my books charged to the account in the Pitman book unpaid.

Briefs to be filed by Tuesday April 24th.

JOB BATCHELOR, *Clerk.*

Endorsed: L. 5037/8. C. A. Brown v. J. D. Spreckels *et al.* Clerk's Minutes. Job Batchelor, Clerk.

129 Know all men by these presents that I Kamehameha III, King of the Hawaiian Islands, of Honolulu in the Island of Oahu, for and in consideration of One hundred dollars to me this day paid in hand by Elizabeth G. I. Bates, the receipt of which is hereby acknowledged, do grant, bargain, sell and by these presents convey unto her the said Elizabeth G. I. Bates and to her heirs, executors, administrators and assigns forever all that certain lot of land situated in Hilo, Island of [Oahu]* aforesaid and described as Hawaii follows: Commencing at North corner of the Court house yard on Waianuenue Street and running along the fence in front of said yard South 43, 30 E. 3.11 chains to the black wall by Merchant Street, thence running down this wall and street N. 51, 30 East 8.35 chains to a large stone, thence across to Waianuenue Street N. 43, 30 West 3.50 chains, thence up this street S. 49 W. 8.33 to place of Commencement. And also the sea beach in front of the same down to heretofore low water mark and being the same premises conveyed to Elizabeth A G. I. Bates by deed which has been mislaid or lost.

To have and to hold the above conveyed premises and all the tenements and hereditaments situated thereon with this my covenant of warranty and lawful seizures unto the said Elizabeth G. I. Bates her heirs, executors, administrators and assigns forever.

In Witness whereof the said party has hereunto set hand and seal at Honolulu this 19th day of Sept'r A. D. 1853.

KAMEHAMEHA. (*)

Executed in presence of
KEONI ANA.

HAWAIIAN ISLANDS, *Oahu, ss:*

On this 21st day of Sept'r 1853, personally appeared *before* Kamehameha III and acknowledged that he executed the
130 within deed for the purposes within stated

ASHER B. BATES,
Registar Conveyances.

Recorded and Compared this 21st day of Sept'r A. D. 1853.
(Stamp, 10c.)

W. A. COOPER,
Dep-ty &c.

REGISTER OFFICE,
HONOLULU, H. I., *Dec. 19th,* 1900.

I hereby certify the foregoing to be a true and correct copy of instrument on Record in this office, in Liber 5, on page 587 of Miscellaneous Records.

(S'g'd)

THOS. G. THRUM,
Registrar of Conveyances.

Endorsed: L. 5038. Plaintiff's Exhibit "A." Filed February 13, 1906. Job Batchelor, Clerk.

[*Scroll in copy for seal.]

131 Know all men by these presents that we Elizabeth G. I. t
Bates and Asher B. Bates of Honolulu Oahu Hawaiian Islands for and in consideration of the sum of Eight Hundred Dollars to us in hand paid by Benjamin Pitman of Hilo, Island of of which
Hawaii, Hawaiian Islands, the receipt [whereof]* is hereby acknowledged, do grant bargain sell and by these presents convey the
unto ∧ said Benjamin Pitman of Hilo, aforesaid and to his heirs, executors administrators and assigns forever all that certain lot of land situate in Hilo, aforesaid and described as follows:

"Commencing at [the]* North corner of the Court house yard on Waianuenue Street and running along the fence in front of said South
yard S. 43 30′ E. 3 11 chs. to the black wall by Merchant Street thence running down this wall and street N. 51° E. 8.35 chs. to a large stone thence across Waianuenue street N. 43° 30′ W. 3 50 chs. up
Thence [by]* this street S. 49° W. 8.33 chs. to place of commencement and containing an area of 2.756 acres." And also the sea beach in front of the same [and]* down to low water mark.

To have and to hold the above granted and bargained premises with the appurtenances thereof unto the said Benjamin Pitman his heirs and assigns to his and their own proper use and behoof forever.

And we do for ourselves, our heirs executors and administrators covenant with the said Benjamin Pitman his heirs and assigns that at and until the ensealing of these presents we are well seized of the premises as of a good and indefeasible estate in fee simple and have good right to brag-in and sell the same in manner and form aforesaid and that the same is free from all encumbrances whatsoever.

And further we do by these presents bind ourselves and our heirs warrant
to ∧ and forever defend the above granted and bargained premises unto the said Benjamin Pitman his heirs and assigns against all claims and demands whatsoever.

132 In witness whereof we have hereunto set our hands and seals this 3 day of July A. D. 1858.

ASHER B. BATES. (†)
ELIZABETH G. I. BATES. (†)

HAWAIIAN ISLANDS, *Oahu, ss:*

On this 10th day of July, A. D. 1858 personally appeared before me Asher B. Bates and Elizabeth G. I. Bates his wife the parties executing the foregoing deed, who severally acknowledged that they had executed the same for the uses and purposes therein set forth and the said Elizabeth G. I. Bates being examined separate and apart from her husband, acknowledged that she had executed the

[*Words enclosed in brackets erased in copy.]
[†Scroll in copy for seal.]

same of her own free will without any fear or compulsion of her said husband.

G. M. ROBERTSON,
Associate Justice of the Supreme Court.

Rec'd and Comp'd this 12th day of July A. D. 1858 at 9 o'clock A. M.

THOMAS BROWN,
Deputy Registrar of Conveyances.

(10c. Stamp 10c.)

REGISTER OFFICE, HONOLULU, — I.,
December 19, 1900.

I hereby certify the foregoing to be a true and correct copy of instrument on Record in this office in Liber 10, on pages 544 and 545 of Miscellaneous Records.

THO-AS G. THRUM,
Registrar of Conveyances.

Endorsed: Law No. 5038 Plaintiff's Exhibit "B" Filed February 13, 1906. Job Batchelor Clerk.

133 ($10.00 Stamp.)
($5.00 Stamp.)

Know all men by these presents that I, Martha B. Pitman of Boston, in the Commonwealth of Massachusetts, United States of America, widow of B. Pitman, at one time a resident of the Hawaiian Islands, in consideration of Five Thousand Dollars to me paid by Charles A. Brown of Honolulu, Island of Oahu, Hawaiian Islands aforesaid, the receipt whereof is hereby acknowledged, do hereby remise, release and forever quitclaim unto said Charles A. Brown and his heirs and assigns forever, all and singular my right, title and interest in and to the land and premises situate in Hilo, Island of Hawaii, Hawaiian Islands aforesaid, described in deed of Kamehameha III to E. G. J. Bates, dated September 19th, 1863, recorded in the Register Office Oahu in Liber 5, page 587, as the sea beach in front of the land described in said deed down to low water mark, also in and to the land and premises situate in said Hilo, described in deed of Kalaeloa and wife to B. Pitman, dated —— recorded in said office in Liber 6, pages 387-388 as right of extension to low water mark, excepting the necessary width of road-way, and for the foregoing consideration I do hereby remise, release and forever quitclaim unto said Charles A. Brown all my right, title and interest in and to all and singular the following described property, namely:

All the lands, premises and property situate in Hilo aforesaid described in deed from E. G. J. Bates to said B. Pitman, dated July th, 1858, recorded in said office in Liber 6, page 387, containing n area of two acres and seven hundred and fifty-six one thoundths of an acre and also the sea beach in front of the same down low water mark, also,

All the lands, premises and property situated in Hilo aforesaid described in said deed of Kalaeloa and wife to said B. Pitma- dated —— recorded in said office, Liber 6, pages 387-388, and the right of extension to low water mark, also

134 All the lands, interests in lands, rights, premises, tenements and hereditaments, beaches, sea rights and fisheries situate or being on the Island of Hawaii aforesaid, belonging to the said B. Pitman at the time of his death, equitable as well as legal, and whether in possession in remainder, reversion, expectancy or otherwise.

To have and to hold the above released lands, premises and property with the right, privilege and appurtenances to the same belonging to said Charles A. Brown and his heirs and assigns forever.

And for the foregoing consideration I do hereby give, sell, assign, transfer and set over unto said Charles A. Brown his executors, administrators and assigns, all my right, title and interest in and to all back rents, issues and profits to which I may be entitled from or on account of said lands, premises and rights, and do hereby authorize him to collect and receive the same, and to receipt therefore in my name, and to bring and prosecute to final conclusion all suits and proceedings at law in equity or otherwise for the recovery thereof, he and they to hold me harmless and indemnify me from all loss or damage that I may sustain by or on account of such suits or proceedings.

In witness whereof I have hereunto set my hand and seal this second day of August, A. D. 1899.

MARTHA B. PITMAN. (*)

In presence of us the letter "B" having been first interlined after the name Martha in the first line of this deed.

H. E. BOLLES,
OLCOTT O. PARTRIDGE,
Commonwealth of Massachusetts.

COUNTY OF SUFFOLK, *City of Boston:*

On this 2nd day of August personally appeared before me
135 Chester A. Reed, a Notary Public in and for the City of Boston, County of Suffolk, State of Massachusetts, United States of America, Martha B. Pitman, widow, known to me as the person described in and who executed the foregoing instrument and acknowledged that she executed the same freely and voluntarily for the uses and purposes therein set forth.

(*) CHESTER A. REED,
Notary Public.

[*Circle in copy for seal.]

HAWAIIAN CONSULATE-GENERAL. *Boston, Massachusetts, ss:*

BOSTON, *August* 2, 1899.

Personally appeared before me, Gorham D. Gilman, Hawaiian Consul-General for the New England States, Mrs. Martha B. Pitman, and acknowledged this instrument and her signature to be of her own free act and deed, and known to me as the person described in and who executed the foregoing instrument.

(*) GORHAM D. GILMAN,
Hawaiian Consul General for the New England States.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

CLERK'S OFFICE OF SUPERIOR COURT.

I, Jos. A. Willard of Boston, in said County, duly elected qualified and sworn as clerk of the Superior Court, for and within said County and Commonwealth, dwelling in Boston in said County, said Court being a Court of Record with a seal which is hereto affixed, the records and seal of which Court I have the custody, do herein and hereby, in the performance of my duty as said Clerk, certify and attest that Chester A. Reed before whom the annexed affidavit proof or acknowledgment was taken and subscribed, is a Notary Public for, within and including the whole of said Commonwealth, and has authority to execute and take affidavits, proofs and acknowledgments in all the Counties in said Commonwealth, duly appointed, commissioned, qualified, sworn and authorized by the laws of said Commonwealth to act as such; and also duly authorized by the laws of said Commonwealth to take affidavits and certify proofs of acknowledgments of deeds of conveyances for lands, tenements, hereditaments, lying and being in said Commonwealth; in any part thereof and to be recorded therein wherever situated and however bounded, that he was at the time of taking the affidavit proof or acknowledgment, hereto annexed, such Notary Public that due faith and credit are and ought to be given to his official
136 acts; that I am well acquainted with his signature and handwriting, and I verily believe that the signature to the said affidavit, proof or acknowledgment is genuine, and further, that the annexed instrument is executed and acknowledged according to the laws of said Commonwealth.

Witness my hand and the seal of said Court at Boston, in said County and Commonwealth, this 2nd day of August, A. D. 1899.

(*) JOS. A. WILLARD, *Clerk.*

(10c. Stamp Documentary 10c.)

Endorsed: L. 5038. Deed. Martha B. Pitman to Charles A. Brown Dated Aug. 2, 1899. Deed of Quit Claim and Release. Recorded in Liber 198 on Pages 287-288. Law No. 5038. Plaintiff's Exhibit "C," Filed February 15, 1906 11:57 A. M. Job Batchelor, Clerk.

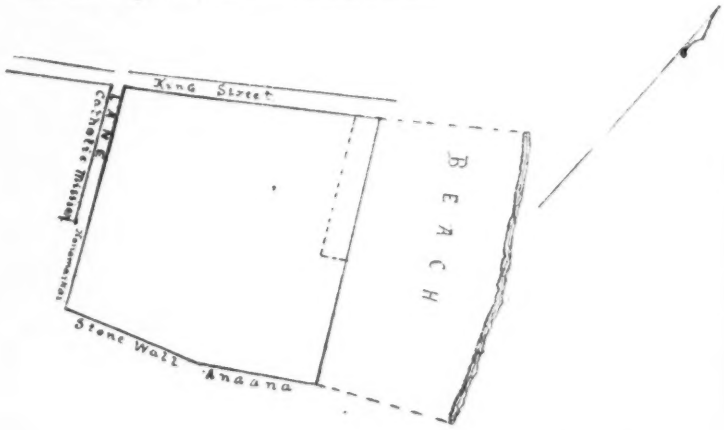
[*Circle in copy for seal.]

137 Helu 4894 Kalaeloa. Piihonua, Hilo, Hawaii.

E hoomaka ma ke kihi Komohana o keia, pili ma kapa o ke ala (King Street) ma kapa oke kai pili ana me ka aina o Anaana a me Popohaku a me Hanamaikai, a e holo ana Akau 53° Hi 24½ Kap.
Alaila Hema 31° Hi. 171 Kap.
Alaila Hema 28° 40′ Hi. 88 Kap.
Alaila Hema 56° Kom. 110 Kap.
Alaila Hema 68° 30′ Kom. 134 Kap.
Alaila Ak. 29° 20′ Kom. 214 Kap. a hiki i kahi i hoomaka'i.

Ma ia Apana 2–16/100 Eka.

Anaia i Apr. 18, 1851 e James Dillon.



W. L. LEE.
G. M. ROBERTSON.
J. H. SMITH.
IOANE II.

Uku pau loa. $5.
Honolulu June 26, 1851.
J. KEKAULAHAO.

I do hereby certify the foregoing to be a true and correct copy of L. C. Award No. 4894 to Kalaeloa, as recorded in Volume 5, pages 75 and 76 of Awards with diagram on file in the office of
138 the Commissioner of Public Lands.

(Signed) JAS. W. PRATT,
[SEAL.] *Commissioner of Public Lands.*

Honolulu, T. H., Feb. 9th, 1906.

Endorsed: Law No. 5038. Plaintiff's Exhibit "D." Filed February 14, 1906. Job Batchelor, Clerk.

139 It is stipulated and agreed by and between the parties hereto, through their respective attorneys, that the annexed translation of Land Commission Award 4894 to Kalaeloa, which is hereby admitted to be correct, may be filed herein and may be treated and considered a part of the record for all purposes.

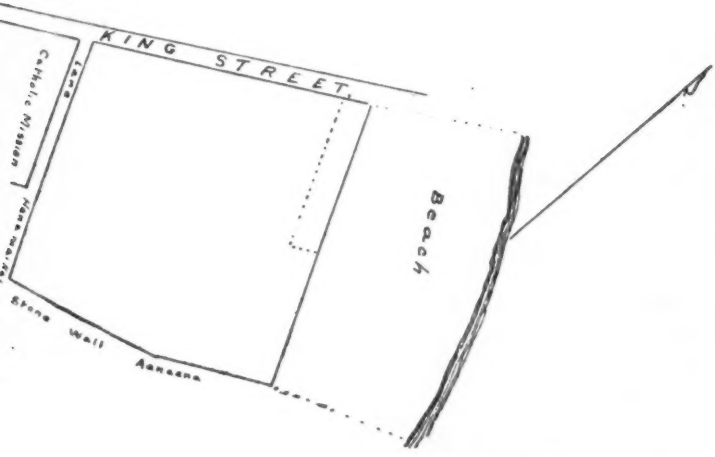
SIDNEY M. BALLOU,
Attorneys for Appellants,
MAGOON & LIGHTFOOT,
Attorney- for Appellee.

Dated Honolulu, T. H., March 30, 1907.

140 Number 4894, Kalaeloa. Piihonua, Hilo, Hawaii.

Beginning at the West corner of this, adjoining the edge of the street (King street) along the edge of the sea adjoining the land of Anaana and stonewall and Hanamaikai and running North 53° East 24½ feet,

hence South 31° East 171 feet,
" South 28° 40′ East 88 " ,
" South 56° West 110 " ,
" South 68° 30′ West 134 " ,
" North 29° 20′ West 214 " to the place of commencement. Containing an area of 2 16/100 Acres. Surveyed Apr. 18, 1851, by James Dillon.



W. L. LEE.
G. M. ROBERTSON.
J. H. SMITH.
IOANE II.

Total paid $5.
Honolulu, June 26, 1851.
J. KEKAULAHAO.

Baldwin & Alexander,
Civil Engineers and Surveyors,
Honolulu, T. H.

141 *Certificate.*

TERRITORY OF HAWAII, *Honolulu, Oahu, ss:*

I hereby certify that the foregoing is a correct translation of Plaintiff's Exhibit "D" in the case of Charles A. Brown *versus* John D. Spreckels *et al.* on file in the Supreme Court of the Territory of Hawaii.

C. L. HOPKINS,
Official Hawaiian Interpreter in and for the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

Dated, Honolulu, Oahu, March 28, 1907.

142 Helu 1144.

Palapala Sila Nui.

A ke Alii, mamuli o ka Olelo a ka poe Hoona Kuleana.

No Ka Mea, Ua hooholo na Luna Hoona i na kumu kuleana ..... i ka olelo, he kuleana oiaio ko

Kalaeloa Kuleana Helu 4894 ma ke ano Kuleana Nui malalo o ke Ano Alodio iloko o kahi i oleloia malalo, a no ka mea ua haawi mai o ua Kalaeloa nei, iloko o ka Waihona Dala Aupuni i kanalima dala no ko ke Aupuni kuleana iloko o ia aina.

Nolaila, ma ke Palapala Sila Nui, ke hoike aku nei o Kamehameha III ke Alii Nui o ke Aina i kona lokomaikai i hoonoho ai maluna o ko Hawaii Pae Aina, i na kanaka a pau, i keia la nona iho, a no kona hope Alii ua hoolilo, a ua haawi aku oia, ma ke Ano Alodio ia

Kalaeloa

i keia wahi a pau loa ma Piihonua Hilo ma ka Mokupuni o Hawaii penei na mokuna:

E hoomaka ma ke kihi Kom. o keia pili ma kapa o ke ala (King Street) ma kapa o ke kai, pili ana me ka aina o Awaawa a me Papohaku a me Hanamaikai, a e holo ana Akau 53° Hik. 24½ Kapuai, alaila Hema 31° Hik. 171 Kapuai, alaila Hema 28° 40′ Hik. 88 Kapuai, alaila Hema 56° Kom. 110 Kapuai, alaila Hema 68½° Kom. 134 Kapuai, alaila Akau 29° 20′ Kom. 214 Kapuai a hiki i kahi i hoomaka'i.

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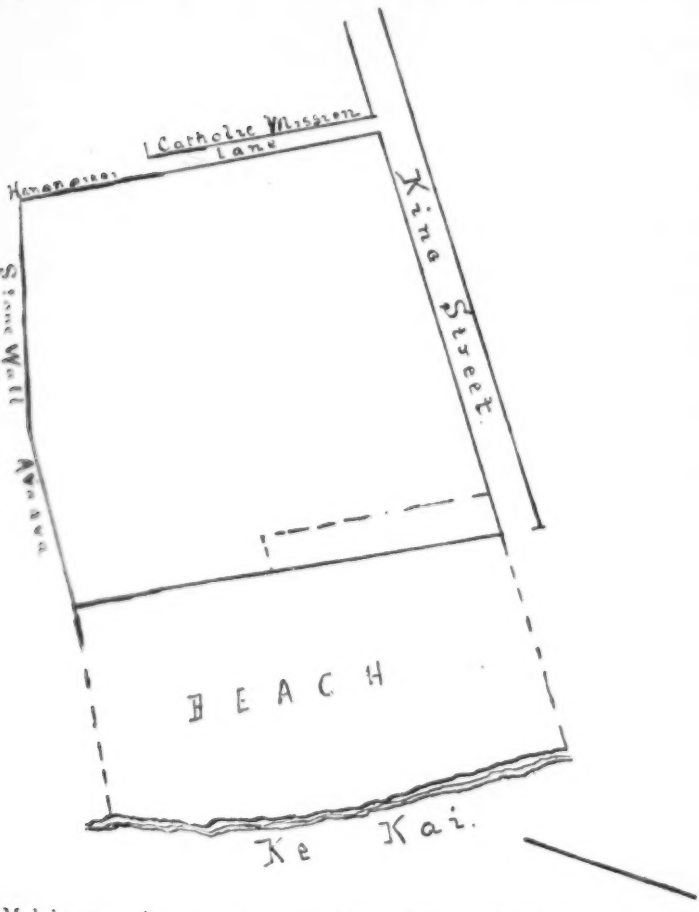
143



Maloko o — ia — apana — 2.16 — Eka a[illegible] iki aku, a emi iki
ai paha. Ua koe nae i ke Aupuni na min[illegible] inerala a me na
etela a pau.

No — Kalaeloa — ua aina la i haawiia ma ke Ano Alodio a
kona mau hooilina, a me kona waihona; au pili nae ka auhau
ka Poe Ahaolelo e kau like ai ma na aina alodio i kela manawa
ia manawa.

A i mea e ike ai, ua kau au i ko'u inoa, a me ka Sila Nui o ko
awaii Pae Aina ma Honolulu i keia la 7 o Iulai 1853.

(Inoa) KAMEHAMEHA.

[Na ka Moi:]*
[Ke Kuhina Kalaiaina,]*
(Inoa) KEONI ANA.

* Words enclosed in brackets erased in copy.]

SE IN CENTER

144 I do hereby certify the foregoing, to be a true and correct copy of Royal Patent No. 1144, L. C. Award No. 4894 to Kalaeloa, as recorded in Volume 3 of Royal Patents, with diagram from the Original papers on file in the office of the Commissioner of Public Lands.

(Signed) JAS. W. PRATT,
[SEAL.] *Commissioner of Public Lands.*

Honolulu, T. H., Feb'y 9th, 1906.

Endorsed: Palpala Sila Nui. Helu 1144. Ka mea nona ke kuleana, Kalaeloa. Apana, Hilo, Mokupuni, Hawaii. Hoopukaia Iulai 7, 1853. Haawiia ia * * * Koina. Ko ke Aupuni Kuleana, $—— Na kope * * * Uku Sila Nui, * * * Huina Nui, * * * $——. Law No. 5038. Plaintiff's Exhibit "E." Filed February 14, 1906, Job Batchelor, Clerk.

145 It is stipulated and agreed by and between the parties hereto, through their respective attorneys, that the annexed translation of Royal Patent 1144 to Kalaeloa, which is hereby admitted to be correct, be filed herein and may be treated and considered a part of the record for all purposes.

SIDNEY M. BALLOU,
Attorneys for Appellants.
MAGOON & LIGHTFOOT,
Attorneys for Appellee.

Dated, Honolulu, T. H., March 30, 1907.

146 No. 1144.

Royal Patent.

Upon Confirmation of the Land Commission.

Whereas, the Board of Commissioners to Quiet Land Titles have by their decision awarded unto

Kalaeloa Land Commission Award No. 4894 an estate of Freehold less than Allodial in and to the land hereafter described, and whereas said Kalaeloa has paid into the Government Exchequer fifty dollars as the Government's interest in the land.

Therefore, Kamehameha III. by the Grace of God, King of the Hawaiian Islands, by this Royal Patent, makes known unto all men, that he has, for himself and his successors in Office, this day granted and given absolutely in Fee Simple, unto

Kalaeloa

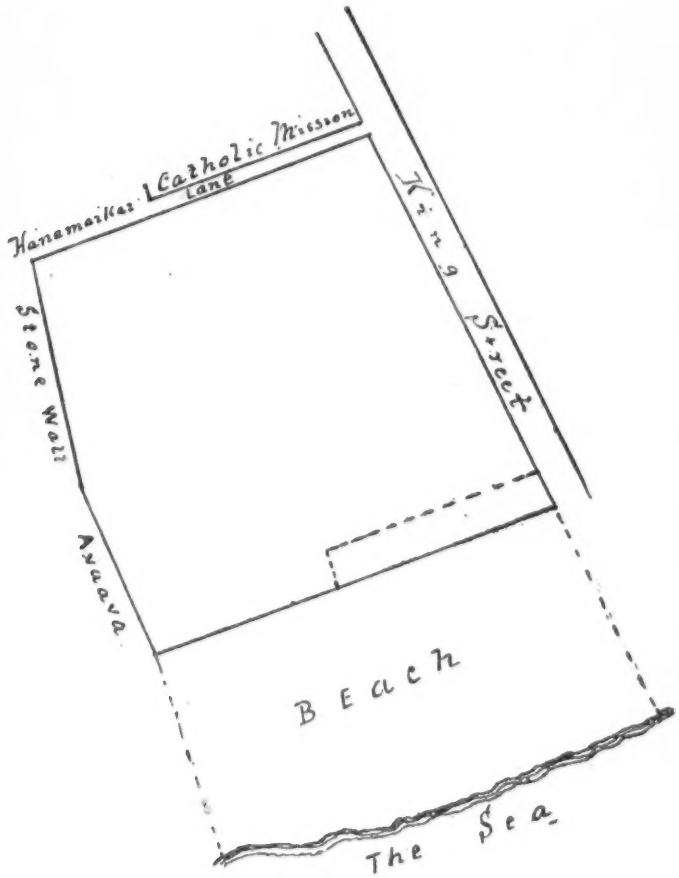
all that certain piece of land situate at Piihonua Hilo in the Island of Hawaii, and described as follows:

Beginning at the West corner of this, adjoining the edge of the street (King street) along the edge of the sea adjoining the land of

COPY BOUND

Awaawa and stone wall and Hanamaikai, and running, North 53° East 24½ feet, thence South 31° East 171 feet, thence South 28° 40′ East 88 feet, thence South 56° West 110 feet, thence South 68½° West 134 feet, thence North 29° 20′ West 214 feet to the place of commencement.

147



Containing an area of 2.16 acres more or less; excepting and reserving to the Hawaiian Government, all mineral or metal-ic mines of every description.

To have and to hold the above granted land in Fee Simple, unto the said Kalaeloa his heirs and assigns forever, subject to the taxes to be from time to time imposed by the Legislative Council, equally upon all landed property held in Fee Simple.

12—281

88
9

OSE IN CENTER

In witness whereof, I have hereunto set my hand and caused the Great Seal of the Hawaiian Islands to be affiexed at Honolulu this 7th day of July, 1853.

(Signed) KAMEHAMEHA. [SEAL.]

(Sign) KEONI ANA.

148 *Certificates.*

TERRITORY OF HAWAII, *Honolulu, Oahu, ss:*

I hereby certify that the foregoing is a correct translation of Plaintiff's Exhibit "E" in the case of Charles A. Brown *versus* John D. Spreckels *et al.* on file in the Supreme Court of the Territory of Hawaii.

C. L. HOPKINS,
Official Hawaiian Interpreter in and for the Circuit Court of the First Judicial Circuit of the Territory of Hawaii.

Dated Honolulu, Oahu, March 28, 1907.

149 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CHARLES A. BROWN
vs.
JOHN D. SPRECKELS and ADOLPH B. SPRECKELS, Partners under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTROM.

Admissions.

It is hereby admitted that the will of Benjamin Pitman devises under the residue clause and without naming or identifying any property all the interest that he had in the land in dispute at the time of his death to Martha B. Pitman.

And it is further admitted that the said will contains substantially the following clauses:

I give and bequeath to my dearly beloved sons, Benjamin Franklin, Charles Brooks and Harold Albert Pitman the sum of One Hundred Dollars each and my blessing, regretting that I have so little to bequeath to them.

To my daughter Mary Ann, One Hundred Dollars.

All the residue and remainder of my property, I give, demise and bequeath to my wife Martha Ball Pitman.

Honolulu, Feb. 14, 1906.

(Signed) HOLMES & STANLEY,
(Signed) MAGOON & LIGHTFOOT,
Att'ys for Pl'ff.
(Signed) KINNEY, McCLANAHAN & COOPER,
(Signed) BALLOU & MARX,
Att'ys for Def'ts.

Endorsed: Law No. 5038. Plaintiff's Exhibit "F," Filed February 14, 1906. Job Batchelor, Clerk.

150 Copy.

(Stamped $1.)

This i-denture made this First day of November, A. D. 1879, by and between Thomas Spencer of Hilo, Hawaii, of the one part and Obadiah B. Spencer of Hilea, Kau, Hawaii, of the other part, witnesseth, that the said Thomas Spencer does hereby lease and demise unto the said Obadiah B. Spencer, certain parcel or parcels of Land, situate and being in Hilo, Island of Hawaii on Piihonua Land, more particularly described as follows, viz:

1st. A certain lot: Number'd Lot 4 in a Deed of Conveyance from B. Pitman and Martha B. Pitman to Thomas Spencer dated the 1st — January, A. D. 1861, situated on Piihonua, Commencing at a stone marked No. 1, at the intersection of King and Front Street-, thence N. 32 W. 260 feet along mountain side of Front Street to a stone marked No. 1 at the intersection of Front & Waianuenue Street, thence S. 48° 15 W. 88 feet, along the North side of this lot to a stone marked No. 1, thence S. 32 E. 255 feet to a stone marked No-. 1 and 2 on the North side of King Street, thence N. 53° 30 E, 87 feet 6 in. along North side of King Street, to the place of commencement containing an Area of 52/100 of an acre—

2nd. A certain lot of land conveyed by Deed dated the 10th day of April, 1861, from B. Pitman and Martha B. Pitman to Thomas Spencer situate in Hilo and described as follows:

Commencing at a stone marked No-. 1 & 2 on the North side of King street thence N. 32 W. 255 feet to a stone marked No-. 1 & 2 on the South side of Waianuenue St. thence along South side of said street S. 48°, 15 W. 115 feet to a Stone marked No-. 2 & 3, thence S. 32° E. 240 feet to a stone marked 2 & 3 on the North side of King Street, thence N. 53 30 E. 113 feet to place of commencement, containing 63/100 Acre.

To have and to hold for the term of Fifty Years from the last day of November, A. D. 1879 (with the privilege of renewing
151 the said lease Fifty years longer from the expiration of the term here stipulated and agreed upon), the said lessor Obadiah B. Spencer yielding and paying rent therefor the sum of Thirty Dollars for each and every year, and the said lessee, for his executors and administrators, heirs and assigns does hereby covenant to and with the said Thomas Spencer his heirs executors administrators and assigns, that he will pay the said rent annually, in equal sums of Thirty Dollars, the first of which payments shall be on the First day of November, A. D. 1880. And it is hereby covenanted and agreed by the said Lessor that all the buildings, Rights, Privileges, and appurtenances on and in the said Land hereby leased as aforesaid, shall be for the full and free use and benefit of the said lessee, Obadiah B. Spencer.

And the said lessor for his heirs and assigns does hereby covenant to and with the said Obadiah B. Spencer that he shall quietly occupy

the premises aforesaid without hindrance or molestation from the said Lessor.

In testimony whereof the said parties have set their hands and seals this First day of November, A. D. 1879 the day and year above written.

(Signed) THOMAS SPENCER. [SEAL.]
—— ——, [SEAL.]

HILO, HAWAII, *Hawaiian Islands, ss:*

On this 11th day of November, A. D. 1879, personally appeared before me Thomas Spencer known to me to be the person described in and who executed the within Instrument who acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein set forth.

(Signed) JOHN J. PORTER,
Agent to take Acknowledgments
152 *for the District of Hilo, Island of Hawaii.*

Endorsed: Law. No. 5038. Plaintiff's Exhibit "Q." Filed March *March* 2nd, 1906. Job Batchelor, Clerk.

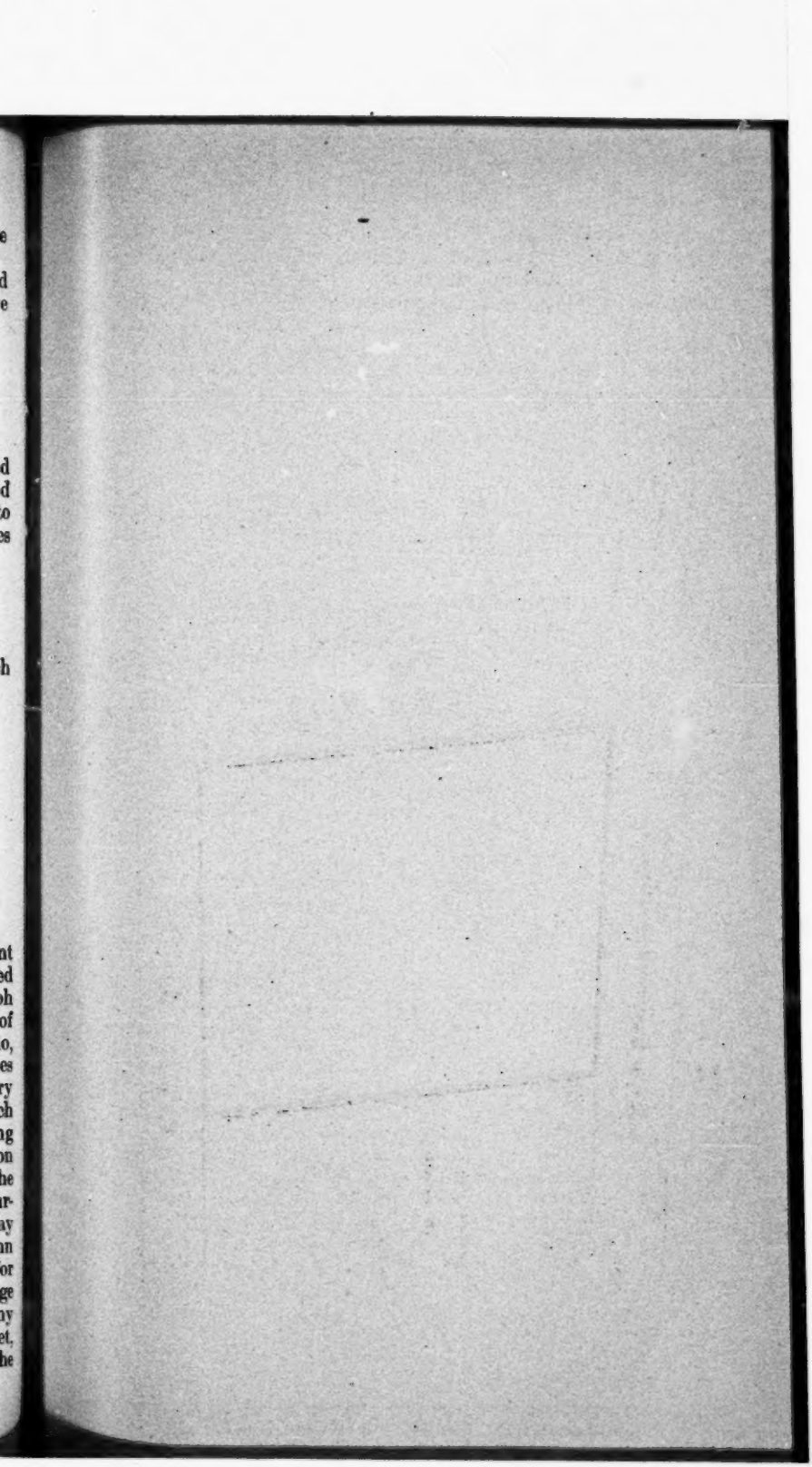
153 Copy.

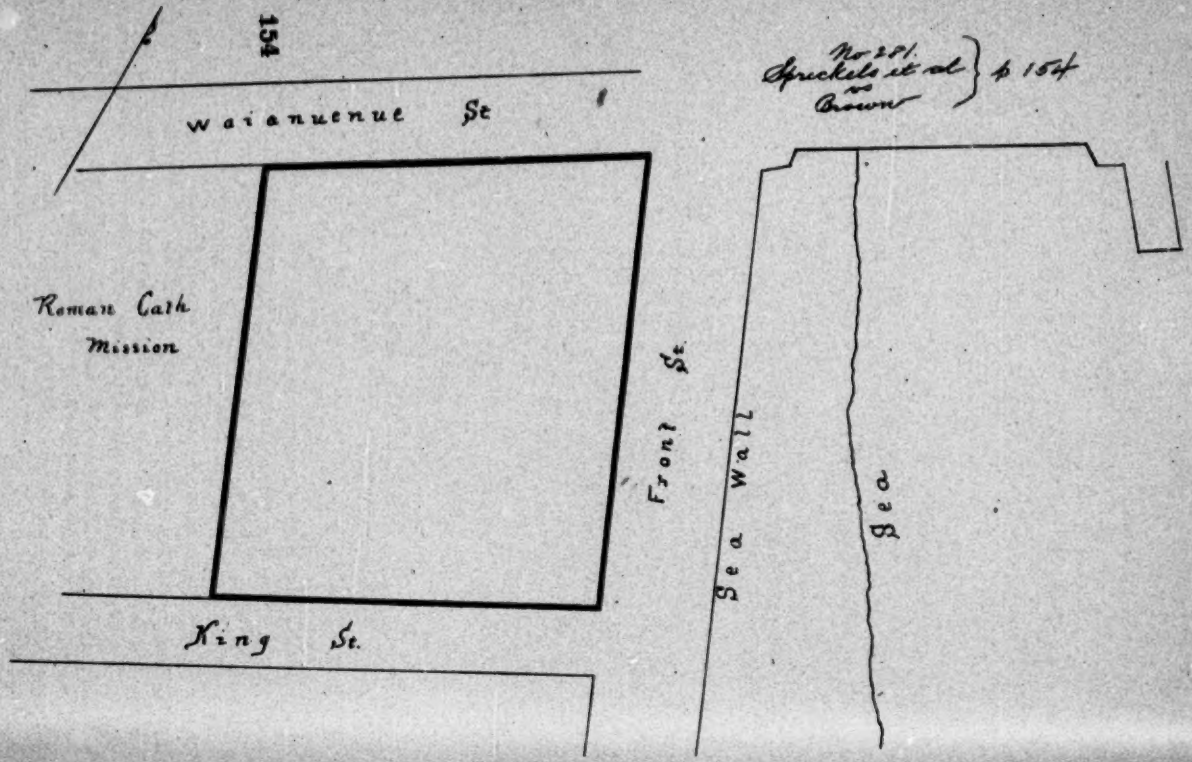
No. 3739.

Patent.

Grant.

The Government of the Republic of Hawaii. By this Its Patent makes known to all men, that in consideration of Five Hundred Dollars paid into the Exchequer, by John D. Spreckels and Adolph B. Spreckels and by way of compromise and equitable settlement of the boundaries of that portion of those premises situated in Hilo, Island of Hawaii, conveyed by Kamehameha III to Elizabeth Bates by deed dated September 19th, A. D. 1853, recorded in the Registry of Deeds in Honolulu, Island of Oahu, in Book 5, page 587, which lie mauka of Front Street, a difference and conflicting claims having arisen between said John D. Spreckels and Adolph B. Spreckels on the one part and the Government of the Republic of Hawaii on the other as to the proper line and limit of said boundaries, and in pursuance of a resolution of the Executive Council adopted the 7th day of March, A. D. 1895, for the further consideration that said John D. Spreckels and Adolph B. Spreckels have herewith dedicated for public highway a strip of land adjoining the entire makai frontage of the premises hereinafter quit claimed in so far as they have any rights or title thereto said strip having an even width of Sixty feet. It the Hawaiian Government has this day quitclaimed unto the




154
Waianuenue St
No 291
Spruckels et al
vs
Brown
} ϕ 154
Roman Cath
Mission
Front St.
Sea Wall
Sea
King St.

said John D. Spreckels and Adolph B. Spreckels all that portion of the land known and described as Piihonua, situated in Hilo, Island of Hawaii, bounded and described as follows:

Beginning at an iron pin at south angle of Waianuenue and Front Streets, thence running by true bearings:

S. 24 45′ E. 240.7 ft. along Front Street to iron pin,
S. 60 08′ W. 202.2 " " King Street to iron pin,
N. 24 15′ W. 229. " " Roman Catholic Mission property to an iron pin at Waianuenue St.
N. 56 47′ E. 201.4 " " Waianuenue Street to the Initial Point.

Area 47 015 Sq. Feet.

(Here follows diagram marked p. 154.)

155 Excepting and reserving to the Hawaiian Government all mineral or metalic mines of every description.

To have and to hold the above granted land in fee simple, unto the said John D. Spreckels and Adolph B. Spreckels their heirs and assigns forever.

In witness whereof, the President of the Republic of Hawaii has hereto set his hand and caused the Great Seal of the Republic to be hereunto affixed this 7th day of March, A. D. 1895.

(S.) SANFORD B. DOLE.

By the President.

(S.) J. A. KING,
Minister of the Interior.

We the President and Executive Council of the Republic of Hawaii, authorize this Grant.

(S.) SANFORD B. DOLE,
President of the Republic of Hawaii.

(S.) FRANCIS M. HATCH,
Minister of Foreign Affairs,

(S.) J. A. KING,
Minister of the Interior,

(S.) S. M. DAMON,
Minister of Finance,

(S.) WILLIAM O. SMITH,
Attorney General,

[SEAL.] *Executive Council of the Republic of Hawaii.*

I do hereby certify the foregoing to be a true and correct copy of Grant No. 3739 as recorded in Book 18 of Grants, with Diagram from the Original Papers on file in the Office of the Com-
156 missioner of Public Lands.

(Signed) STEPHEN MAHAULU,
[SEAL.] *Secretary and Sub-agent of Public Lands for the Fifth Land District.*

Honolulu, July 23rd, 1901.

This certificate is signed by me as Secretary and Sub-Agent of the Fifth Land District owing to the absence of the Commissioner of Public Lands from the city.

(Signed) STEPHEN MAHAULU.

I do hereby certify the foregoing to be a true and correct copy of Grant No. 3739 as recorded in Book 18 of Grants, with Diagram from the Original Papers on file in the Office of the Commissioner of Public Lands.

(Signed) ED. S. BOYD,
[SEAL.] *Commissioner of Public Lands.*

Honolulu, January 3rd, 1903.

Endorsed: Plaintiff's Exhibit "Y." Law 5038. C. A. Brown v. J. D. Spreckels *et al.* M'ch 6/06.

157 Stamped.

Know all men by these presents that I, Benjamin Pitman at present residing in Honolulu, Island of Oahu, Hawaiian Islands, have made, constituted and appointed and by these presents, do make, constitute and appoint Messrs. H. Hackfeld & Co. of Honolulu, Island of Oahu, my true & lawful attorney- for me and in my name, place and stead to enter into and take possession of all such lands, tenements, hereditaments and real estate, whatever, on the Islands of Oahu & Hawaii, Hawaiian Islands whereof I am or may be in any way entitled or interested—and to grant, bargain and sell the same or any part or parcel thereof for such sum or price and on such terms as to them shall seem meet—and for me and in my name to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same—either with or without convenants and warranty. And until the sale thereof—to let and demise the said real estate for the best rent that can be procured for the same—and to ask, demand, recover and receive all such sums of money which shall become due and owing to me by means of such bargain, sale or lease—and to take all lawful ways and means for the recovery thereof—to compound and agree for the same and execute and deliver sufficient discharges & acquittances thereof—with power of substitution and revocation—giving and granting unto my said Attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation—giving and granting unto my said Attorneys full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in & about the
158 premises as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation hereby ratifying and confirming all that my said Attorneys or their substitute shall lawfully do or cause to be done by virtue thereof.

In witness whereof I have hereunto set my hand and seal this the twenty fourth day of June in the year one thousand eight hundred and sixty one.

B. PITMAN. (*)

Sealed & Delivered in the presence of
CHAS. R. BISHOP.
JOHN H. PATY.

REGISTER OFFICE, *Oahu, ss:*

On this 25th day of June, A. D. 1861, personally appeared before me B. Pitman, party to the foregoing instrument & acknowledged that he had executed the same for the uses & purposes therein set forth.

THOMAS BROWN,
Registrar of Conveyances.

[*Circle in copy for seal.]

Know all men by these presents that I Martha Ball Pitman, wife of Benjamin Pitman, at present residing in Honolulu, Oahu, Hawaiian Islands, have made, constituted & appointed and by these presents do make, constitute & appoint Messrs. H. Hackfeld & Co. my true and lawful Attorney- for me & in my name, place and stead to grant, bargain and sell all my right, title and interest and dower in and to all Real Estate whatever on the Island of Oahu or Hawaii, Hawaiian Islands, whereof I am or may be in any way entitled or interested & to grant, bargain and sell the same or any
159 part or parcel thereof for such sum or price and on such terms as to them shall seem meet, and for me and in my name to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same—giving and granting unto my said Attorney- full power & authority to do and perform all and every act & thing whatsoever requisite & necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present—with full power of substitution and revocation hereby ratifying and confirming all that my said Attorney- or their substitute shall lawfully do or cause to be done by virtue thereof.

In witness whereof I have hereunto set my hand and seal this the twenty fourth day of June, in the year of our Lord, one thousand, eight hundred and sixty one.

MARTHA B. PITMAN. (*)

Sealed and signed in the presence of
THOMAS BROWN.

HONOLULU, *Oahu, ss:*

June 25th, 1861, Personally appeared before me Martha B. Pitman, wife of the aforesaid Benjamin Pitman and on a private examination separate & apart from her husband, declared that she executed the foregoing instrument of her own free will without compulsion, fear or constraint from her husband.

THOMAS BROWN,
Registrar of Conveyances.

Recorded & Compared this 8th April, 1864 at 12 o'clock at noon.
THOMAS BROWN,
Registrar of Conveyances.

160 Office of the Registrar of Conveyances.

HONOLULU, T. H., *February 16th,* 1906.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii, in Book 18, pages 92, 93 and 94.

Attest:

[SEAL.] CHAS. H. MERRIAM,
Registrar of Conveyances for the Territory of Hawaii.

[* Circle in copy for seal.]

Endorsed: Certified Copy Power of Attorney B. Pitman & wf. to H. Hackfeld & Co. Dated June 24th, A. D. 1861. Recorded Book 18 Page- 92-94 Registry of Conveyances for the Territory of Hawaii at Honolulu. Law No. 5038. Defendants' Exhibit "1" Filed February 16, 1906. Job Batchelor, Clerk.

161 In the Supreme Court of the Territory of Hawaii.

JOHN S. McGREW, Plaintiff,
vs.
THOMAS SPENCER, GEORGE W. MACFARLANE, ANDREW WELCH, BISHOP & Co., and WILLIAMS, BLANCHARD & Co., Defendants.

Certificate.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

I, J. A. Thompson, Deputy Clerk of the Supreme Court of the Territory of Hawaii, certify that the document hereto attached, consisting of eight (8) pages, is a true and correct copy of the "Decree of Foreclosure" now on file in the Clerk's Office of the said Supreme Court in the above entitled cause. (Equity Division No. 275.)

Witness my hand and the Seal of the said Supreme Court, at Honolulu, Oahu, this 5th day of July, A. D. Nineteen hundred and One.

[SEAL.] (Signed) J. A. THOMPSON,
Deputy Clerk Supreme Court, Territory of Hawaii.

162 In the Supreme Court of the Hawaiian Islands. In Equity.

JOHN S. McGREW, Plaintiff,
vs.
THOMAS SPENCER, GEORGE W. McFARLANE, ANDREW WELCH, BISHOP & Co., and WILLIAMS, BLANCHARD & Co., Defendants.

Before the Honorable Charles C. Harris, Chief Justice, at Chambers.

This cause having been this day brought on to be heard, upon the bill of complaint filed herein, taken as confessed by Andrew Welch and Williams, Blanchard & Co., of the defendants, and on the several answers of Thomas Spencer and George W. Macfarlane, of the defendants, in which they state that they have no objection to a decree of foreclosure of the mortgages of the said complainant, upon proof of the amount of the indebtedness of the said defendant Thomas Spencer to the said complainant, and on the answer of Bishop & Co., who ask proof before the Court of the said indebtedness; and this Court having ordered J. E. Barnard one of the Masters in Chancery of this Court to take proofs of the indebtedness of the said defendant Thomas Spencer to the said complainant, and by a further order that said Master should make a

J. A. T.

report of the said indebtedness, including the principal and interest, and the said Master in Chancery having taken proofs, and reported to the Court in pursuance of said orders, on the 22d day of June, 1880, that the amount due by the said defendant Thomas Spencer to the said complainant, was the sum of $153,048.00. Where-
163 upon on the coming in and hearing of the said report, it appeared to the Court that there was a written agreement between the said complainant John S. McGrew, and the said defendant Thomas Spencer, dated the 23d day of December, 1876, by which the amount due on the said mortgages held by the said complainant, must be reduced to the sum of ($25750.00) twenty five thousand seven hundred and fifty dollars, with interest, and what-
Green,
ever sum might be advanced by [George W.]* ∧ Macfarlane & Co. to the said defendant Thomas Spencer, up to May the first, 1880, and which said agreement was ordered to be filed in this cause; and
Green,
it appearing to the Court that the said [George W.]* ∧ Macfarlane & Co. had advanced to the said defendant Thomas Spencer, under said agreement, including principal and interest the sum of ($48,534.35) forty eight thousand five hundred and thirty four dollars and thirty five cents, which with the aforesaid sum of $25750.00 twenty five thousand seven hundred and fifty dollars, with the interest due thereon since the 21st day of March, 1880, amounts in the aggregate to the sum of $75399.68 seventy five thousand three hundred and ninety nine dollars and 68 cents. J.A.T.
And thereupon, on motion of W. C. Jones, Solicitor for said complainant, it is ordered, adjudged and decreed, and this Court by virtue of the authority therein vested doth order, adjudge and decree, that judgment be rendered and decreed in favor of the said
Green,
Complainant, and for the benefit of the said [George W.]* Macfarlane & Co. against the said defendant Thomas Spencer, for the said sum of $75,399.68. And it is further ordered adjudged and decreed that all the right, title, claim and interest of the said defendant Thomas Spencer, in and to all and singular the said mortgaged premises, lands, tenements and hereditaments mentioned in the said complainants' bill of complaint, together with all
164 the effects, goods, chattels, wares and merchandize mentioned in said mortgages and said complainant's bill of complaint in this cause and hereinafter more particularly described, or so much thereof as may be sufficient to raise the amount due to the said complainant for the principal, interest and costs in this case, if any portion can be sold separately without any material injury to the parties interested, at Public Auction by the Marshall of the Hawaiian Islands at the [Court House]* front door of the Aliiolani Hale, Honolulu, Island of Oahu; that the Marshall give public notice of the time and place for sale according to the course and practice of

[* Words enclosed in brackets erased in copy.]

this Court, and that the complainant or any of the parties in this cause may become the purchaser or purchasers, that the Marshall execute a deed to the purchaser or purchasers of the premises ordered to be sold as aforesaid at the said sale and that the said Marshall out of the proceeds of the said sale retain his fees, disbursements and commissions on said sale and pay to the complainant or to his solicitor out of said proceeds his costs in this suit taxed and $48.00 and the amount [reported due]* adjudged and decreed as aforesaid together with lawful interest thereon from decree the date of this [said report,]* or so much thereof as the proceeds of the sale of said mortgaged premises will pay of the same—and that the Marshall take receipt for the said amount so paid and file the same with his report, and that he bring the surplus money arising from said sale if any there be into this Court without delay, to abide the further order of this Court; and it is further ordered adjudged and decreed that the defendants and all persons claiming or to claim from or under them and all persons having a mortgage lien subsequently to said mortgages judgment or decree, upon all the right, title, claim and interest of the said defendant Thomas 165 Spencer, in and to the lands specified and described in the heirs said mortgages, and his and their [being]* and personal representa- such tives, and all persons having any lien or claim by or under [said]* subsequent mortgage, judgment or decree and their heirs and personal representatives and all parties claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim of in and to the said mortgaged premises, and every part or parcel thereof; and it is further ordered that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof and that any of the parties in this cause who may be in possession of said premises or any part thereof and any person who since the commencement of this trial has come into possession under them or either of them, deliver possession thereof to the said purchaser or purchasers on the production of the Marshall deed for such premises and a certified copy of the order confirming the such report of such sale after [which]* order has become absolute. And it is further ordered and decreed that if the money arising from the said sale shall be insufficient to pay the amount so reported due to the complainant and Green, Macfarlane & Co. with the interest and costs and expenses of sale as aforesaid that said Marshall specify the amount of such deficiency in his report of said sale.

J. A. T.

J. A. T.

The description and particular bounds of the property authorized virtue to be sold under and by [notice]* of this decree so far as the same can be ascertained by the mortgages above referred to, or from the bill of complaint in this cause are as follows, to wit:

[* Words enclosed in brackets erased in copy.]

First. All that piece and parcel of land situate in Hilo, Hawaii, containing 1 92/100 acres the notes and bounds of which are more particularly described in Royal Patent No. 4 granted to
166 Benjamin Pitman and which was by the said Benjamin Pitman conveyed to the party of the first part by deed of conveyance dated first day of January, 1861, and duly recorded in the registry office in Honolulu in liber 13 on pages 384-385 & 386.

Second. Also all that piece of land situate in Puhonua Hilo, Hawaii, containing an area of 16/100 acres more or less and more particularly described in deed of conveyance from His Majesty Kamehameha IV to Benjamin Pitman bearing date the twenty fourth day of September, 1860, and duly recorded in the registry office in Honolulu in Liber 13 on pages 272 & 273, which piece of land was also conveyed to the party of the first part by the said Benjamin Pitman by deed bearing date the first day of January, 1861, and duly recorded in the office of the Registrar of Conveyances in Honolulu in liber 13 on pages 384, 385 & 386.

Third. Also all that piece of land consisting of two parcels
J.A.T. situate in Pueo Hilo, Hawaii, containing an area of 162 4/10 acres more or less, the boundaries of which are described and set forth in the notes of survey made by Theophilus Metcalf and now on file in the Home office marked No. 23 granted to the said Benjamin Pitman by Royal Patent No. 23 and which pieces of land were by the said Benjamin Pitman conveyed to the party of the first part by deed dated 1st January, 1861, and duly recorded in the Registry Office in Honolulu in Liber 13 on pages 384, 385, 386.

Fourth. Also all those two pieces of land situate in Pueo Hawaii, containing an area of 210 5/8 acres more or less the boundaries of which are more particularly, set forth in Royal Patent No. 185 granted to Ben Pitman, and by him conveyed to the party of the first part by deed dated 1st January, 1861, and duly recorded in the Registry office in Honolulu in Liber 13 on pages 384-385-386.

167 Fifth. Also all that parcel of land situate in Kona, Hawaii, containing an area of 323 91/100 acres more particularly described in a certain deed of conveyance from Benjamin Pitman to the party of the first part bearing date 1st January, 1861, and duly recorded in the registry office in Honolulu in Liber 13 on pages 384, 385, 386.

Sixth. Also all that piece of land in Puhonua Hilo containing 52/100 acres, the boundaries of which are set forth in a certain deed of conveyance from Benjamin Pitman to the party of the first part, bearing date the 1st day of January, 1861, and duly recorded in the Registry office in Honolulu in Liber 13 on pages 384, 385, 386.

Seventh. Also all that piece of land in Puhonua Hilo Hawaii containing 12/56 of an acre and more particularly described
J.A.T. in a deed of conveyance from Benjamin Pitman to the party of the first part dated the 1st day of January, 1861, and duly recorded in the Registry Office in Honolulu in Liber 13 on pages 384, 385, 386.

Eighth. Also all that piece of land situate in Hilo Hawaii con-

taining 9/200 of an acre or 2016 feet more or less, and more particularly described in a deed of conveyance to the party of the first part from S. Pohena and Kanae his wife dated the 20th March, 1861, and duly recorded in the Registry office in Honolulu in Liber 14 on pages 7 and 8.

Ninth. Also all that piece of land situate in Hilo Hawaii containing an area of 63/100 acres and more particularly described in a deed of conveyance from Benjamin Pitman to the party of the first part, bearing date 10th April, 1861, and duly recorded in the Registry Office in Honolulu in Liber 14 on pages 47, 48.

Tenth. Also all that piece and parcel of land situate in
168 Hilo, Hawaii, containing 485 50/100 fathoms and more particularly described in a deed of conveyance from Ewalilo Kui and Lukia Hana his wife to the party of the first part, bearing date the 7th day of August, 1861 and duly recorded in the office of the Registrar of Conveyances in Honolulu in Liber 14, on pages 234 & 235.

Eleventh. All that portion of the Ahupuaa of Pueo conveyed by the Commissioners of Crown Lands to the said Thomas Spencer by deed dated 3d day of August, 1870, and duly recorded in the office of the Registrar of Conveyances Honolulu in Liber 30 on pages 384 & 385 bounded on the makai side by the sea, on the Waiakea side by the Wailuku River, on the mauka side by a line parallel with the face of the forest, and one half mile back of same—on the Hamakua side of the Puhikai stream together with all the forest land of Pueo, containing an area of 4000 acres more or less.

J. A. T.

Twelfth. All the unexpired term of the lease of that piece of land in Hilo aforesaid containing three acres and seven rods, being the same demised to B. Pitman, by Kamehameha III, by Indenture of lease dated the first day of July, 1850, for the term of fifty years, recorded in Registrar's Office aforesaid in Liber 4 on pages 365 and 366.

Also, all the personal property and estate situated on the lands of the Spencer Plantation above described, and *and* specified and described in said mortgage deeds as follows: To wit:

All the goods, wares and merchandize, chattels and effects now in and upon the above described premises or any part thereof, or in any store or stores, store house or house, building or buildings, in and upon the above described premises or any part thereof for the purpose of sale or otherwise.

169 Also, all buildings, mills, water wheels, machinery, utensils vacuum pans, clarifiers, coolers, certrificals, tools and implements connected with and used in the manufacture of sugar, all agricultural implements, cattle, horses, mules, carts, waggons, harness, yokes, plows chains and all other property goods and chattels of whatsoever name, nature or description, belonging to the said defendant Thomas Spencer, or in any wise appertaining to or connected with the said Spencer Sugar Plantation, situated on the premises above described and used in the cultivation of sugar cane or the

manufacture of sugar, and in which the said defendant Thomas Spencer, has any right, title, interest and estate;

Also all crops of sugar cane growing upon the premises above described, and all sugar now manufactured.

Given under my hand at Chambers in Aliiolani Hale.

J. A. T. Honolulu, Island of Oahu, this 2nd day of [July]* August, 1880.

(Signed) CHAS. C. HARRIS,
Chief Justice of the Supreme Court.

Endorsed: E. 275. John S. McGrew *vs.* Thomas Spencer *et alt.* Decree of Foreclosure. 31 July 1880 (Sig.) Jno. E. Barnard, Clerk. Law No. 5038 Defendants' Exhibit "5" Filed Feb'y 21st, 1906. Job Batchelor, Clerk.

170 In the Supreme Court of the Territory of Hawaii.

CHARLES A. BROWN, Defendant in Error,

vs.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error.

($2. stamps)

Ejectment.

Petition for Writ of Error.

To the Supreme Court of the Territory of Hawaii:

The undersigned, John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron, respectfully represent:

That they were parties defendant to a certain action in ejectment filed in the Circuit Court of the Fourth Circuit, Territory of Hawaii and removed by a change of venue to the Circuit Court of the First Circuit, Territory of Hawaii, entitled Charles A. Brown, Plaintiff, *vs.* John D. Spreckels, Adolph B. Spreckels and C. August
171 Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, A. G. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron De-

[* Words enclosed in brackets erased in copy.]

fendants, in which action and in which Circuit Court of the First Circuit a verdict in favor of the plaintiff was rendered on the 8th day of March, A. D. 1906.

That they are aggrieved by the decisions of the Court and by the verdict of the jury in said cause, as more fully appears by their assignment of errors herewith.

That six months have not elapsed from the rendition of the judgment in said cause and that execution therein is not fully satisfied.

That they, being plaintiffs in error herein, desire that the record shall include a transcript of evidence in the case, as well as all pleadings, motions, notes or bills of exceptions, exhibits and Clerk's or Magistrate's notes of proceedings.

That they have deposited the sum of Twenty-five Dollars ($25.00) to cover costs and have filed a bond with the Clerk in favor of the prevailing party in said cause conditioned for the payment of said judgment in said original cause in case of failure to sustain the writ of error.

Wherefore your petitioners pray that a Writ of Error may be issued from this Honorable Court to the Circuit Court of the First Circuit in the said action entitled Charles A. Brown, Plaintiff, *vs.* John D. Spreckels, *et al.*, Defendants, commanding the Clerk of said Court forthwith to send up to this Court the record and all exhibits filed in said cause, including an original transcript of evidence and original exhibits, and certified printed or typewritten copies of all other papers, including all pleadings, motions, notes or bills of exceptions, and Clerk's or Magistrate's notes of proceedings, and that upon due hearing this Honorable Court shall enter
172 judgment reversing the judgment of the Circuit Court of the First Circuit in said action, or such other judgment as the facts and law warrant.

Dated, Honolulu, April 4, A. D., 1906.

JOHN D. SPRECKELS,
ADOLPH B. SPRECKELS AND
C. AUGUST SPRECKELS,
Partners Doing Business under the Firm Name of
J. D. Spreckels Bros., and
A. G. SERRÃO,
D. LYCURGUS,
S. C. GUERERA,
W. C. BORDEN,
W. K. AKANA,
WING SING,
KWONG WA KEE,
C. AHO,
PETER MIGUEL,
TANG SING, AND
MRS. JOHN UTTERSTRON,

(Signed) By their Attorneys, KINNEY, McCLANAHAN & COOPER,

" BALLOU & MARX.

HONOLULU, COUNTY OF OAHU, *Territory of Hawaii, ss:*

W. M. Giffard being first duly sworn, on oath deposes and says: That he is Attorney in Fact for John D. Spreckels and Adolph B. Spreckels, petitioners named in the foregoing petition for Writ of Error; that he has read said petition and knows the contents thereof, and that all and singular the matters and things therein alleged are true.

(Signed) W. M. GIFFARD.

Subscribed and sworn to before me this 5th day of April, A. D. 1906.

[SEAL.] (Signed) WM. J. FORBES,
Notary Public, First Judicial Circuit.

Endorsed: S. C. No. 114 Registered Vol. 1, Page 88. Supreme Court Territory of Hawaii. Charles A. Brown, Defendant in Error *vs.* John D. Spreckels *et al.*, Plaintiffs in Error. Ejectment. Petition for Writ of Error. Filed April 6, 1906. George Lucas, Clerk. Ballou & Marx 303 Stangenwald Bldg. Honolulu Attorneys for Plaintiffs in Error. (Office No. ——.)

173 In the Supreme Court of the Territory of Hawaii.

CHARLES A. BROWN, Defendant in Error,

vs.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error.

Ejectment.

Assignment of Errors.

Now come John D. Spreckels, Adolph B. Spreckels and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron, plaintiffs in error in the above entitled cause and show to the Court that the following errors of law occurred at the trial of and in connection with the above entitled cause and appear of record therein.

1. That the Court erred in admitting in evidence the release from Martha B. Pitman to Charles A. Brown, dated August 2, 1899 and purporting to release the premises in controversy in this suit.

2. That the Court erred in denying the motion of defendants in Court below for a non suit.

3. That the Court erred in allowing the testimony of George
174 W. Macfarlane taken at a prior trial of this case to be read in evidence to the jury against the objection of counsel for the defendants.

4. That the Court erred in giving the following instruction to the jury: "I instruct you that the words 'also the sea beach in front of the same down to low water mark' used in the deed of Kamehameha III to Elizabeth J. I. Bates, covers the land described in Exhibit A." (Plaintiff's Instruction No. 2)

5. That the Court erred in giving the following instruction to the jury: "I instruct you that the words 'with the right of extension to low water mark' used in the deed from Kalaeloa to Pitman together with the other particular descriptions contained in said deed covers the land described in Schedule B. (Plaintiff's Instruction No. 3)

6. That the Court erred in giving the following instruction to the jury: "I instruct you that the plaintiff has made out a complete paper title to the two pieces of land described in Schedules A and B attached to his complaint." (Plaintiff's Instruction No. 5)

7. That the Court erred in giving the following instruction to the jury: "I charge you that the defendants in this case rely for one defense upon adverse possession. The burden of proving this defense is upon defendants; unless you are satisfied by a preponderance of the evidence that the defendants have clearly proven adverse possession as defined in these instructions, you will find against the defendants upon that point." (Plaintiff's Instruction No. 6)

8. That the Court erred in refusing to give the following instructions duly requested in writing by the defendants: "I instruct you that the plaintiff has shown no title to any of the land lying east of King Street, lying between present high water and low
175 water mark, and as to such land, you must find for the defendants." (Defendants' Request for Instruction No. 13)

9. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: "I charge you that there is no evidence that the defendants have deprived the plaintiff of the possession of any property below high water mark, and in the absence of evidence of ouster your verdict must be for the defendants for such property." (Defendants' request for Instruction No. 14)

10. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: "Unless you find that the plaintiff had some interest in or possession of some part of the premises described in the release from Martha B. Pitman to himself at the date of the delivery of said deed, such release would pass no title to the premises therein described." (Defendants' request for Instruction No. 24)

11. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: "I instruct you that the deed from Kamehameha III to E. G. I. Bates conveyed only the space included in the surveyed portion together with the

land between high and low water marks in front of the same." (Defendants' request for Instruction No. 25)

12. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: "I instruct you that the deed of the Kalaeloa premises from Kalaeloa to Pitman did not convey the fee simple title to any land below the upper side of Front Street." (Defendants' request for Instruction No. 26)

13. That the Court erred in denying defendants' request for a directed verdict for defendants.

176 14. That the verdict rendered in said cause was and is contrary to the law and the evidence.

15. That the Court erred in admitting in evidence on Motion for new trial the affidavits of H. P. Benson, James E. Jaeger, Thos. W. Chase, P. Lishman, Wm. Buckle, H. W. Doane, H. G. Cowan, E. G. Fuller, Chas. H. Pfeiffer, M. Mellis, Jno. Michell and F. C. Atherton, jurors in said cause, filed as reply affidavits by plaintiffs.

16. That the Court erred in denying the Motion for the defendants in the Court below for judgment *non obstante veredicto.*

17. That the Court erred in over-ruling the defendants' Motion for a new trial.

Honolulu, April 4 1906.

(Signed) KINNEY, McCLANAHAN & COOPER,
" BALLOU & MARX,
Attorneys for Plaintiffs in Error.

To Charles A. Brown, Defendant in Error:

Please take notice that a Writ of Error has issued upon the petition of the above named plaintiffs in error in connection with the foregoing assignment of errors.

Honolulu, April 6 1906.

(Signed) KINNEY, McCLANAHAN & COOPER,
" BALLOU & MARX,
Attorneys for Plaintiffs in Error.

Endorsed: S. C. No. 114. Registered Vol. 1 Page 88 Supreme Court Territory of Hawaii Charles A. Brown, Defendant in Error *vs.* John D. Spreckels *et al.* Plaintiffs in Error. Ejectment. Assignment of Errors. Filed April 6, 1906. George Lucas, Clerk. Ballou & Marx 303 Stangenwald Bldg. Honolulu Attorneys for Plaintiffs in Error. (Office ——.)

177 In the Supreme Court of the Territory of Hawaii.

CHARLES A. BROWN, Defendant in Error,

vs.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BRODEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error.

($2. Stamps)

Ejectment.

Writ of Error.

To Job Batchelor, Clerk of the Circuit Court of the First Circuit, Territory of Hawaii:

Whereas in an action of ejectment lately pending before the Circuit Court of the First Judicial Circuit, entitled Charles A. Brown, Plaintiff, *vs.* J. D. Spreckels, *et al.*, Defendants, error is alleged to have occurred as appears by the assignment of errors on file in this Court, you are commanded forthwith to send up to this Court the record and all exhibits filed in said proceedings, including an original transcript of evidence and the original exhibits, and certified printed or typewritten copies of all other papers, including all pleadings, motions, notes or bills of exceptions, exhibits and Clerk's or Magistrate's notes of proceedings.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii this 6th day of April, A. D. 1906.

[SEAL.] (Signed) GEORGE LUCAS, *Clerk.*

178 Endorsed: Supreme Court Territory of Hawaii. Charles A. Brown Defendant in Error *vs.* John D. Spreckels *et al.* Plaintiffs in Error. Ejectment. Writ of Error. S. C. No. 114. Registered Vol. 1, Page 88. Rec'd $25. Filed and issued April 6, 1906. Henry Smith, Clerk. Returned August 14/06. J. A. Thompson, Clerk. Ballou & Marx 303 Stangenwald Bldg. Honolulu Attorneys for Plaintiffs in error. (Office No. —.)

In obedience to the within writ to me directed I herewith send up the record and all the exhibits filed in said above mentioned cause, said record being prepared and certified to by J. A. Thompson, Esq., Clerk of said Court.

(Signed) JOB BATCHELOR,
Clerk Circuit Court, 1st Circuit.

Dated Honolulu, Aug. 14th, 1906.

179 In the Supreme Court of the Territory of Hawaii, October Term, 1901.

CHARLES A. BROWN

v.

JOHN D. SPRECKELS and ADOLPH B. SPRECKELS, Partners under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTROM.

CHARLES A. BROWN

v.

J. D. SPRECKELS and ADOLPH B. SPRECKELS, Partners under the Name of J. D. Spreckels Bros., and KUM LEONG, SANG CHUN, MARIA NIAU, AH PING, and J. CAMERON.

Exceptions from Circuit Court, Fourth Circuit.

Submitted January 13, 1902. Decided August 29, 1902.

Frear, C. J., Perry, J., and L. A. Dickey, Esq., of the Bar, in place of Galbraith, J., disqualified.

Parol evidence is inadmissible to vary or contradict the terms of a deed, as, for instance, to show that the survey notes made one distance longer than that described in the deed.

Evidence is inadmissible to show the usual meaning of ordinary words, as, for instance, the broader popular or the narrower legal meaning of the word "beach." The Courts take judicial notice of such meanings.

The beach between high and low water marks could be granted to private persons before the annexation of these islands to the United States.

180 Even if the law were now different, titles to beach property previously acquired would remain valid.

Crown lands were alienable by the King in 1853.

Accretion belongs to the littoral proprietor.

A description in a deed, first by monuments, one boundary being represented as adjoining or coinciding with the edge or the shore of the sea; then by courses and distances, which apparently do not go quite to high water mark, and finally by a diagram representing the space between the land as described by courses and distances and the sea as "beach," carries title to high water mark at least.

The words "with the right of extension to low water mark" added to a specific description of certain land near the sea, carry the fee to the land in front of the specifically described land, so far as the grantor has the fee.

As a rule land cannot be appurtenant to land.

In construing a deed, the court will, in order to give effect to the intention of the parties, construe a word in a popular or technical or purely arbitrary sense, provided the intended sense can be ascertained in a legal manner. Ordinarily the ordinary meaning will be given to a word, but that it was used in some other sense may be shown by the context, or by proof that it had a different meaning in the particular trade or locality, or, in case of a latent ambiguity, by parol evidence of the special circumstances of the case.

The word "beach" may be used in a legal sense as meaning the space between high and low water marks or in a popular sense as including more or less land, according to the circumstances, above high water mark.

When a deed described certain land by courses and distances and then added, "And also the sea beach in front of the same
181 down to low water mark," and the particularly described land extended nearly to high water mark and the land between was of little value and was used in connection with the rest and no reason appeared for not including it or for granting the beach between high and low water marks alone, and possession of the strip between was taken by the grantee without question, it was error to direct a nonsuit on the ground that the word "beach" had a fixed legal meaning covering the space between high and low water marks alone.

182 *Opinion of the Court by Frear, C. J.*

These two actions of ejectment were tried together in the Circuit Court and argued together in this Court. They are for accretions on the water front at Hilo, Hawaii. One piece is covered by the second action and two pieces by the first, but only two titles are involved, the two pieces last mentioned being covered by one title, and the chains of title are in part the same for all three pieces.

Front street runs nearly parallel with and not far from the sea shore at Hilo. Waianuenue and King streets run at right angles to Front street, one block apart, King street being on the southeasterly or Puna side of Waianuenue and King streets; the other covers land above Front street, but on the other or Puna side of King street. The question in these actions is whether these titles cover the land, mostly accretion, below Front street, that is, between Front street and the sea, in front of the pieces on the upper side of that street.

The chain of title to the land between Waianuenue and King streets, known as the Bates land, is in part as follows: Deed from King Kamehameha III to Elizabeth G. J. Bates, September 19, 1853; deed from Elizabeth G. J. Bates and Asher B. Bates, her husband, to Benjamin Pitman, July 3, 1858. The chain of title to the other piece, known as the Kalaeloa land, is in part as follows: Land Commission Award 4894, April 18, 1851, to Kalaeloa, followed by Royal Patent 1144, July 7, 1853; deed from Kalaeloa and Hanae, his wife, to Benjamin Pitman, not dated, but acknowledged August

28, and September 18, 1854. The chains of title, thus united, continue as follows: Devise by Benjamin Pitman to Martha B.
183 Pitman, his wife, by will dated March 4, 1880, probated March 27, 1888; deed from Martha B. Pitman to the plaintiff, Charles A. Brown, August 2, 1899.

There seems to be no dispute as to the plaintiff's paper titles. The only question is how much they cover. The defendants offered no evidence, but relied wholly on the weakness of the plaintiff's case, and at the close of the plaintiff's case moved for a non suit, which was granted in each case, on the ground that the plaintiff had failed to show that his titles covered the lands in dispute. The plaintiff brings the cases here on three exceptions, two to the refusal to admit offered testimony and one to the order of nonsuit. The first two exceptions relate to the Bates land only and will be considered first.

The deed from Kamehameha III to Mrs. Bates describes the portion of the Bates land, or most of it, above Front street by courses and distances and monuments, and then adds the following: "And also the sea beach in front of the same down to low water mark." The defendants contended that the word "beach" has a fixed legal meaning, namely, the shore between high and low water mark, and that there was a strip between high water mark and the part described by metes and bounds which did not pass under the deed. The plaintiff contended that the word "beach" was used in its broader popular sense and that it included the strip just mentioned. At the time of the deed from Kamehameha III the sea ran in much farther than it does at present, the land was of little value, the consideration for the 2.756 acres being only $100, and Front street, perhaps then not known by that or any other name, though it appears to have been known by that name within a year afterwards, was little more than a path or trail. The front line of the portion of the land described by metes and bounds did not coincide with the present upper side of Front street but ran diagonally up from King street to Waianuenue street, striking the latter street
184 about a chain above the present corner of that street and Front street. This is accounted for by the defendants on the theory that the tendency under those early conditions was to go across or cut off corners as much as possible for convenience, and that Front street then slanted up as it approached Waianuenue street and that consequently the description in the deed was made to cover only what was above Front street as it then ran. The plaintiff contended that the description in the deed was intended to extend to the present line of Front street but that by mistake one side, that on Waianuenue street was made too short by one chain, and so he offered to prove that that side was one chain longer in the original survey notes than in the deed. The first exception was to the refusal of the court to permit him to do this.

No error was committed in excluding the survey notes. They were offered merely for the purpose of showing that the length of one side was longer in the survey notes than in the deed, that is, for the purpose of varying or contradicting the deed. Parol evidence is inadmissible for the purpose of varying or contradicting the terms of a deed. The survey notes were not offered for the purpose of

explaining a latent ambiguity. We presume they would have been inadmissible even if they had been offered for that purpose, for, although there may be a latent ambiguity in another portion of the deed, there was none in the portion with reference to which the notes were offered. It may added that there was nothing on the face of the notes to connect them with this deed, and the only testimony relied on was that of a brother of the surveyor, which was very indefinite, and the field notes and deed differ in respect of every course and distance as well as in other important respects.

The second exception was to the refusal of the court to allow the plaintiff to ask a witness, "what is your opinion, as a surveyor, as to what the word beach means in this country?" In view of
185 what we shall say in regard to the next exception and our conclusion thereon, it will not be necessary to say much in regard to this exception. If the intention was to show that the word "beach" is used in this country in the broader popular sense as well as in the narrower legal sense, the testimony was properly excluded, for the reason that evidence is not needed or competent to prove usual meanings of ordinary words. Courts take judicial notice of such meanings. If the intention was to show that the word was used in this country in a peculiar sense different from its ordinary sense, testimony of that general character might perhaps theoretically have been admissible, although in this case there is every reason to believe that the attempt to show that would have been unsuccessful, if it had been allowed, but, even if such testimony were admissible for that purpose, the question asked was perhaps properly disallowed for the reason that there was nothing to indicate that it was, and much to indicate that it was not, offered for that purpose, and the question related to the present time only, not to the time half a century ago when the deeds were executed. A word may have acquired a special meaning here recently, and yet not at that early period in the history of English speaking peoples in these islands.

The third exception was to the order of nonsuit in each case. This order was based by the trial judge on the ground that the King or Government could not under the old regime alienate the shore between high and low water marks, and perhaps on the ground also that even if the power to alienate did exist then, the federal law now controls and forbids such alienation. Counsel for defendants, while presenting this ground of inalienability relied on by the Circuit Judge, rely mostly on other grounds to support the order of nonsuit.

There can be no doubt that the power formerly existed here to alienate land between high and low water marks. *King v.*
186 *O. R. & L. Co.*, 11 Haw. 17; *Territory v. Liliuokalani*, 14 Haw. 88. There can also be no doubt that if such alienation was made in these cases, the fact that these islands have since become annexed to the United States would not affect the private rights previously granted, even if the law as held by the federal courts differed from the law that previously obtained in these islands in this respect. Whether title was granted in these cases to low water mark or not, we need not say. For it was not shown, nor was any attempt made to show, that the defendants were in possession between high and

low water mark, and hence no recovery could be had of that strip. Possibly, even if it had been shown that they were in possession of that strip, ejectment would lie, if the plaintiff owned to high water mark, even though he did not own to low water mark, considering his special privileges in the shore in front of his land and the defendant's want of an exclusive right of occupancy. The order of nonsuit was clearly erroneous if the plaintiff owned to high-water mark only. Most of the land sued for and all that was sought to be recovered at the trial is above high-water mark.

The Bates land, covered by the deed from the King, was part of the Crown lands. But at that time the Crown lands were alienable by the King. *Estate of Kamehameha IV*, 2 Haw. 715.

If the plaintiff's predecessors in title owned to high water mark the plaintiff now owns to high water mark although that is now owing to accretion, much farther out than it was formerly. *Hapstead v. Gay*, 7 Haw. 587.

What then do the titles cover? The Kalaeloa piece will be considered first. The description is substantially the same in both the Award and the Patent. It is in Hawaiian and may be translated thus: "Beginning at the West corner of this, adjoining the edge of the street (King street) along the edge of the sea adjoining the land of Awaawa and stone wall and Hanamaikai, and running.

Then follows courses and distances and area. Thus there are
187 two descriptions. One is by monuments, that is, King street on one side, the sea in front, the land of Awaawa and stone wall on the other side and the land of Hanamaikai in the rear. The other description is simply by courses and distances. There is no dispute as to what each of these descriptions means. The two descriptions were evidently meant to correspond or harmonize. The description by monuments would take the land to the sea, that is at least to high water mark. There is also a diagram on both Award and Patent, representing the land by heavy lines, leaving a space between the front line and the sea, inclosed at the ends with dotted lines, extensions of the two side lines, and with the word "beach" in this space. The names of the other monuments also appear on the diagram in their proper places. If the word "beach" on the diagram was used in its narrower sense as meaning the space between high and low water marks, the meaning contended for by defendants themselves, it is evident that the lower or front boundary as described was intended to be at least down to high water mark. The natural monument along the entire front boundary is given as the edge or shore of the sea. This of course would control courses, distance and area, in the absence of a clearly indicated intention to the contrary. The description of this boundary is "*ma kapa o ke kai*," that is, "along the edge of the sea," similar to that of the first side, which is, "*pili ma kapa o ke ala*," that is, "adjoining the edge of the street." It is true, the boundaries of the other sides are described as, "*pili ana me*" instead of "*pili ma*," but we do not see how any distinction material for the purposes of this case can be made in the meaning. The expression is the same for the sea and the street and the diagram and description both show that the land runs

the *street*. The fact probably was that the description or survey by courses and distances was for convenience made of the land above what was popularly considered the beach, without any particular reference to where ordinary high water mark was; that the
188 description by monuments showed what was actually intended to be covered, and that the diagram was an attempt to represent both these modes of description at the same time. It seems clear on the whole that the land was intended to go at least to high water mark.

Two other questions are raised in regard to the Kalaeloa, land. One is that whatever the Award and Patent passed to Kalaeloa, the deed from him to Pitman did not carry the part below the upper side of Front street. The description is first of a portion of the Kalaeloa land by monuments, courses and distances. It begins at the corner of King and Front streets and runs along Front street to a certain point and then up and around to the point of beginning, and then adds, "with the right of extension to lower water mark saving and excepting the necessary width of road way." The road way excepted was Front street. It is contended that the grant of the "right of extension to low water mark" was a grant at most of an easement. The word "extension" would seem to imply that the right granted in this clause was of the same kind as that granted in the previous clause, that is, a fee simple. The exception of "the necessary width of road way" also tends to show that something more than an easement was intended to be granted. There is nothing to indicate that Kalaeloa claimed or supposed he had any particular easement in the lower land. He had the fee, and, having the fee, he no doubt intended to grant it. The clause should be construed, if possible, as having some meaning, or so as to be given effect. There is no easement that can be assigned to it. It must have meant the fee, as the word "extension" indicates. It is true a better way of drawing the deed might easily be suggested, but that is true of most documents that become subjects of litigation. A clause is not to be rejected merely on the theory that if it was intended to have a particular meaning it might better have been expressed in some other way. The method of expression employed was very likely due to the peculiar method of description in
189 the Award and Patent and the special features of the land. In *Dillingham v. Roberts*, 75 Me. 469, the words, "including all the privilege of the shore to low water mark," added to a specific description to high water mark, was held to carry the fee to low water mark.

It is further contended in regard to the Kalaeloa land that the rights of Pitman, if he had any, in the land below Front street under his deed from Kalaeloa, did not pass to the plaintiff, for the reason that they had already passed from Pitman under a previous deed made in 1861 by him to one Thomas Spencer. This deed to Spencer covered several pieces of land, one of which was a portion of the Kalaeloa land other than the portion claimed by the plaintiff. The only words in that deed under which it is contended that the land below Front street passed to Spencer are "with

the appurtenances thereof" in the habendum clause. As a rule land cannot be appurtenant to land. This rule may have some exceptions, but even if the present case could be one of them, the evidence was clearly not sufficient to show that the lower land was so used in connection with the portion of the upper land conveyed to Spencer as to require the court to hold as matter of law that it passed as a mere appurtenance of it.

Turning now to the Bates land, the question is one of greater difficulty. In the deed from the King this land is described by courses and distances and, except the front line, by monuments. Then follow these words: "And also the sea beach in front of the same down to low water mark." The defendants contend that the word "beach" was used here in its narrower legal sense as meaning the area between high and low water marks, and that parol evidence is inadmissible to show that it was used in a broader popular sense as including more or less land above high water mark according to the circumstances. They contend that the intention was to convey two distinct pieces of land, with a strip between re-
190 maining in the grantor, there being a strip between high water mark and the front line of the part more specifically described in the deed.

A word may be used in a deed in almost any sense, and if it appears in a proper way that the intention was to use a word in any particular sense, whether a technical sense or a popular sense or a sense in which the word is not used at all by others, the court will give it the intended meaning. It is immaterial whether the parties used it in a wrong sense by mistake or consent. If the intention can be ascertained in a legal manner, it will be given effect. Of course the expressed intention cannot be controlled by proof of a different actual intention. Ordinarily a word is given its ordinary meaning. But if the deed itself shows it to have been used in some other sense, it will be so construed. If the deed does not show that, still it may be shown by parol evidence that the word was used in a particular sense in a particular trade or locality, in which case the court will so construe it, on the presumption that the parties under the circumstances used the word in that sense. And in the absense of any showing of a special sense by the deed or by special custom or usage, parol evidence is admissible to explain the meaning if there is a latent ambiguity.

Now, the word "beach" undoubtedly is used in a broader popular sense as well as in a narrower legal sense. Every one knows this. The former use is probably the more common of the two in ordinary speech. Defendants contend that the word "beach" is synonymous with "shore," and yet in Mather *v.* Chapman, 40 Conn. 382, under a deed of certain land reserving the privilege of piling up seamanure "on the shore," the court held that the shore was the upland above high water mark. The defendants had argued in that case much as the defendants argue here, that the word "shore" had a definite and inflexible meaning in law, denoting the space be-

tween high and low water marks, and cited the same authorities to a large extent.

191 There is nothing to prevent the parties using the word in its more popular sense if they so desire. Naturally the courts construe it in its narrower legal sense. The cases in which such construction is given are mostly cases in which the beach is designated as a boundary. In such cases, of course, as, for instance, when land or a boundary is described as running to or along the beach, the narrower meaning has to be followed generally for certainty. Otherwise it would in many cases be impossible to say where the inner line of the beach was. But when, as in this case, there is a grant of the beach itself in addition to a grant of land above the beach, or, as in the Connecticut case just cited, there is granted or reserved a right to do something on the beach, there is not the same necessity for a strict construction.

In the present case there are indications in the deed itself that the broader meaning was intended. Other land was granted and the beach "in front of the same." This expression, like the word beach, is used in two senses. It might mean anywhere in front, even though there were a strip between, but presumably it means immediately in front, that is, adjoining. In other words, the phrase "in front of" tends to show that the word "beach" was intended to cover all up to the particularly described land. The words "down to low water mark" point in the same direction. They seem to indicate that the word "beach" was not used in a strictly legal sense as necessarily in itself covering just the area between high and low water marks, no more and no less.

The natural construction, looking at the deed alone, would be that the particularly described land extended to high water mark and that the additional clause carried the grant down to low water mark. There is no patent ambiguity. But when an attempt is made to apply the description to the land, a latent ambiguity appears. There is found a strip between high water mark and the lower particularly described boundary. This especially in

192 connection with the phrases "in front of the same" and "down to low water mark," gives rise to the question whether the word "beach" was not used in its broader sense. This question arising by evidence *aliunde* may be determined by evidence *aliunde*.

The grantor owned the whole strip and under the same title as the part particularly described. The area between that part and high water mark was not very extensive and was of little value and was closely connected with the upper part in use. There was no apparent reason why the whole should not be conveyed. There was apparently much reason why it should be. It does not seem natural that the space between high and low water mark- should be conveyed leaving the strip between in the grantor. For what purpose would that space alone be granted? The fact that there was a roadway in front of the upper part may account for the separate description of the two parts. The lower boundary of the upper part, according to the defendants' own contention, was intended to run along the

roadway as it was at that time. Then, again, there was testimony tending to show that this broader construction was placed upon the deed by the parties at the time, as shown by their acts. There was testimony, for instance, tending to show that possession was taken and held in accordance with that construction without question. There was more or less testimony as to just where high water mark was at the time of the deed from the King, but it will hardly be necessary to go into that at length now. Apparently at that time there was an earth bank against which the sea washed, which was in places above the present lower side of Front street, and sometimes in very stormy weather the sea washed over it in places.

From what has been said, it is clear not only that the word "beach" might have been used in its broader sense, but that there is much reason to believe that it was used in that sense, and
193 that the trial judge erred in directing a nonsuit.

This exception to the order of nonsuit is sustained and a new trial is ordered in each case.

(Signed) W. F. FREAR.
(Signed) A. PERRY.
(Signed) LYLE A. DICKEY.

J. A. Magoon, T. I. Dillon, Holmes & Stanley, and Smith & Parsons, for the plaintiff.

Kinney, Ballou & McClanahan, for the defendants.

Endorsed: Supreme Court Territory of Hawaii. C. A. Brown *vs.* John D. Spreckels. Decision. Filed Aug. 29, 1902. George Lucas, Clerk.

194 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

CHARLES A. BROWN

v.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners under the Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KOWNG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTROM.

Error to Circuit Court, First Circuit.

Argued Oct. 1, 2, 3, 1906. Decided November 15, 1906.

Frear, C. J., Hartwell and Wilder, JJ.

Release—deed of, valid, though releasee not in possession.—A deed of release, when made for a consideration, may be construed as a deed of bargain and sale, in order to effectuate the intention of the parties and avoid its invalidity because of the releasee's want of possession.

Even if such a deed would not be valid under such circumstances at common law, it would be valid here under Hawaiian usage and decisions.

Boundaries—"beach," "edge of sea," title to low water, under award and patent.—An award and patent described land by courses and distances which would carry it to the upper side of a street near the shore and parallel with it, and by a natural monument, the "edge of the sea," which would carry it further to at least high water and might have been intended to carry it to low water, and contained a diagram which shows the lot as described by courses and distances and ex-
195 tends in dotted lines the side boundaries to the water and connects them with wavy lines marked "the sea" and marks the space between those lines and the lower course and distance line the "beach," which space also is shown by the evidence to cover land below high water. Held, the title extended to low water.

Id.—description adding "with the right of extension to low water mark."—A deed describing the land as above without the diagram but adding "with the right of extension to low water mark" carries the fee to low water mark.

Id.—"sea beach," in this case, includes some land above high water mark.—A deed conveying land described by courses, distances and monuments which would carry it to the upper side of a road running near the shore, "and also the sea beach in front of the same down to low water mark," is held under the circumstances to include the area between the lower course and distance boundary and high water mark as well as the area between high and lower water marks.

Accretions—how divided between adjoining proprietors.—The rule that accretion should be divided between adjoining proprietors so as to give them new shore lines proportionate with the old is not of universal application—as, for instance, when there is a deep indentation or, as in this case, a sharp projection.

Erroneous instruction—failure to observe, harmless.—A verdict should not be set aside because the jury failed to observe an erroneous instruction.

Testimony taken at former trial—reading of, held harmless, if erroneous.—The reading of the testimony given at a former
196 trial of the case by a witness temporarily absent from the Territory at the present trial, is held harmless, if erroneous, because if all the evidence on the point testified to (an alleged break in the alleged adverse possession of the defendants and their predecessors) were stricken out, there would still be no evidence that there was adverse possession during the period testified to and the burden was on the defendants to show that. Moreover this was not a case for "tracking."

Adverse possession—degree of proof.—An instruction that the jury should find against the defendants on the issue of adverse possession unless they "were satisfied by a preponderance of the evidence that the defendants have *clearly* proven adverse possession." etc., is not erroneous.

Lost deed—may or should be presumed, when.—When for a long period a plaintiff in ejection and his predecessors have made no claim of title and the defendants and their predecessors have been in possession under claim of title, the court may, according to the circumstances, instruct the jury that they may or should presume a deed to the defendants' predecessor in order to quiet their possession and solve the difficulties, and in so doing the jury may consider what may have occurred as well as what may fairly be supposed to have actually occurred. In this case the question was left to the jury and the evidence was such as to permit, if not require, them to find the theory of a lost deed.

Ouster—little evidence required to prove, as to part of land, when. —When the land sued for includes parts above and below high water claimed under one title and treated largely as a
197 whole and the defendants are shown to be in possession to high water at least, little evidence is required to show that they are also in possession of the part below high water. There was sufficient evidence to show this in this case.

Comment on evidence—not ground for new trial, even if prejudicial, when consented to by counsel.—It is not sufficient ground for a new trial that the trial judge in overruling a motion for a directed verdict in the absence of the jury made, by way of explaining his decision, remarks which showed that he leaned strongly towards the plaintiff's side in his view of the evidence and that such remarks were published in the newspapers and read by the jurors before the case was submitted to them and were referred to and read by them after their retirement, although they had been instructed not to be influenced by them—the defendants, movants for the new trial, having consented previously that the jurors might read the newspapers and asked the judge not to order them not to read them and stated that they, the defendants, were willing to take their chances.

Conduct of jury—error in admitting affidavits as to, held harmless. —The erroneous admission, in opposition to a motion for a new trial, of affidavits of jurors, to the effect that they would have heeded the admonition of the court, if given, not to read certain newspapers, to their reading of which counsel consented, and that they were uninfluenced by the publication therein of certain remarks of the court, was harmless, for the reason that they did not affect the decision of the court on the motion and the decision was right irrespective of the affidavits.

198 *Opinion of the Court, by Frear, C. J.*

This is an action of ejection for two pieces of land, referred to as the Bates and Kalaeloa lands, an the waterfront at Hilo. It was begun in the fourth circuit in 1899. At the first trial the jury disagreed. At the second a nonsuit was ordered which was set aside

by this court (14 Haw. 399.) At the third trial, in the third circuit, to which the venue was changed, the jury disagreed. At the fourth trial, in the first circuit, to which the venue was changed, the jury disagreed. It was then held that the venue had not been changed from the fourth circuit on the theory that the order for the change was void owing to disqualification of the judge, but this court held otherwise and directed by writ of mandamus the court in the first circuit to try the case (16 Haw. 476). Then after a long and careful trial the plaintiff obtained a verdict which the defendants now seek to have set aside on writ of error.

The facts are set forth somewhat fully in 14 Haw. 399. Briefly, Front street runs nearly parallel with and not far from the shore. Waianuenue and King streets run at right angles to Front street one block apart. The Bates land is between these two streets, and the Kalaeloa land on the other side of King street. Both lands extend down at least to the upper side of Front street, and, according to the plaintiff, down on the other side of Front street to low water mark. The plaintiff does not dispute the defendants' title to the parts above the street. The action is for the parts below the street, all or mostly accretions.

The defendants contend, first, that the plaintiff has failed to show title in himself to all or part of the land because (1) there was not a sufficient conveyance to him, (2) the description in the Kalaeloa land commission award and patent did not cover any land below Front street, or at least below high water mark,
199 (3) the description in the original deed of the Bates land from the king did not cover any land below Front street excepting between high and low water marks, and (4) the plaintiff is not entitled to all the accretion in front of the Bates land under the rule of apportionment of accretion between adjoining proprietors; secondly, that the defendants, the Spreckels brothers, showed title in themselves by (5) adverse possession and (6) a presumed lost grant; thirdly, that (7) the plaintiff failed to prove ouster or possession by the defendants as to the part below high water mark; and, lastly, that the verdict should be set aside because of (8) misconduct of the jury. These questions are raised by seventeen assignments of error based on the contentions that the verdict is contrary to the law and the evidence, that the trial judge erred in admitting certain evidence, in giving and refusing various instructions, in denying motions for a non suit, a directed verdict, judgment *non obstante* and a new trial, and in admitting certain affidavits on the question of the misconduct of the jury.

1. The first contention (mainly under assignments of error 1, 2, 6 and 10), is that the plaintiff did not have title to any part of the land in dispute for the reason that the deed under which he claims is merely a deed of release and therefore void because made to him when out of possession and without an interest in the land.

The Kalaeloa land was confirmed to Kalaeloa in 1851 by L. C. A. 4894, R. P. 1144, and by him conveyed to Benjamin Pitman in 1854. The Bates land was conveyed by Kamehameha III to

Elizabeth G. J. Bates in 1853 and by her to Benjamin Pitman in 1858. The parts of both lands above Front street were next conveyed by Pitman to Thomas Spencer in 1861. Pitman then left these islands not to return and died in Boston in 1888 leaving the parts below Front street, in so far as title to them was in
200 him, to his wife as part of the residue of his estate devised to her. In 1899 she, not in possession made the deed in question to the plaintiff, who also was not in possession. The operative words of the deed are "remise, release and forever quit claim unto said Charles A. Brown and his heirs and assigns forever, all and singular my right, title and interest in and to the land and premises," etc. This form is used twice in the deed, and the habendum refers to "the above released lands, premises and property." The words "give, sell, assign, transfer and set over" are used in the instrument, but only with reference to back rents, issues and profits.

The contention is that a release at common law to one out of possession is void and that, under Rev. Laws, Sec. 1, the common law must be followed here except as modified by Hawaiian statute, usage or judicial precedent. A distinction is drawn between a release proper and the so-called modern quitclaim deed, at least if the latter contains words of grant in addition to or without the usual operative words of a release.

Deeds often bear a dual character and may be construed as belonging to one class or another according to the circumstances in order to effectuate the intention of the parties. On this theory it is well settled that a deed of release when made for a consideration (in this case the consideration was $5000) should be treated as a primary deed of bargain and sale in order to avoid its invalidity, as a secondary or derivative deed of release, because of the releasee's want of possession. 13 Cyc. 525; Tiedman, Real Property, Sec. 782; and cases there cited.

Aside from this, a deed of release, though to one out of possession, is effectual in these islands because supported by usage,—which also is in harmony with judicial decisions as far as they have gone; for the foundations of the rule against releases to one out of possession,—such as the necessity for livery of seisin
201 unless the grantee is already in possession, and the early law against champerty, maintenance and assignment of choses in action—have been held not to obtain here. Mossman *v.* Government, 10 Haw. 421, 436, in which a conveyance by a disseisee was held valid. The general line of reasoning applied in Henrique *v.* Paris, 10 Haw. 413, is largely applicable to this case; and in this as in that case, it may be stated that the usage, although it may not have been the subject of actual judicial decision, has been recognized by the court to some extent. For instance, in Ninia *v.* Wilder, 12 Haw. 104, 118, the court said: "This rule of the common law, however, rendering void a conveyance by a disseisee to a stranger is not in force here," and, referring to a case elsewhere, "in that case, the release was to one of the parties in possession having title.

But it matters not here, whether the release be to a party in possession or a stranger."

2. It is contended (assignments of error 5, 6, 8 and 12) that the Kalaeloa land did not extend below the upper side of Front street and therefore did not include any of the land now in dispute, which is all below that line, or, at least, that it did not extend below high water mark. Under the former decision, (14 Haw. at p. 406), the deeds of the land from the patentee to Pitman and from the latter's residuary devisee to the plaintiff carried the fee to low water mark, under the words "with the right of extension to low water mark," provided the patentee had title to low water mark. The question is whether the patentee had such title under his award and patent. It was held in the former decision (p. 405) that the award and patent carried the title at least to high water mark under the description by monuments, which was held to control the description by courses and distances. If the title extended no further we presume that ejectment would not lie to protect the plaintiff's special privileges on the shore in front of his land, and that he would have to rely for such protection upon some other
202 remedy, such as trespass on the case or injunction, although he might retain his verdict by remitting all below high water mark; but in our opinion the title extended to low water mark.

The description of the lower boundary of the land in the patent is "ma kapa o ke kai," that is, "along the edge or side of the sea." This is ambiguous. It might mean along high water mark or along low water mark. Presumptively it means along high water mark. But the description in the award and patent by courses and distances brings the land down only to the upper side of Front street which was above high water mark; the description by the natural monument, the edge of the sea, brings it, as held in the former decision at least to high water mark, that is, below the upper side of Front street; the diagram in the award and patent shows the boundary according to courses and distances and then extends in dotted lines the two side boundaries to the water and connects their ends with curved irregular lines marked "ke kai," the sea, and the entire space between the sea and the lower course and distance boundary is marked "beach." Therefore, as shown by the natural monument, at least part of the space marked "beach," that is, to high water mark, was intended to be covered by the patent, and, as shown by the diagram, if any of this space was intended, all of it must have been. But "beach" means primarily the space between high and low water marks. In this instance, as intimated in the former decision, the word was apparently used in its broader, popular sense as including more or less above high water mark, but it would naturally and presumptively include the shore at least, that is, the space between high and low water marks, and in this case there is nothing to indicate that it was not intended to include that, —and apparently it was understood to include that, as shown by the descriptions in the subsequent deeds "with the right of extension to low water mark." The evidence also tends to show that

part of the space marked "beach" was then below high wat
203 mark. The peculiar method of description in the patent
easily accounted for by the fact that Front street, then
mere unimproved roadway, ran across the land just below the po
tion described by courses and distances, and that below that the
was for the most part only a sandy stretch. There is no rule of la
that would prevent the title from extending to low water mar
Former decision, *supra*, at p. 404. There are other awards a
patents that cover land below high water mark, and, as we sha
see, the title to the neighboring land now in dispute covered t
shore.

3. The contention (assignments of error 4, 6, and 11) in rega
to the Bates land is the reverse of that in regard to the Kalael
land. It is that the original deed from the king to Bates covere
besides the land above Front street, only the beach strictly speakin
that is, between high and low water marks, which would be
shifting strip moving out and in with accretions and attrition
and that the accretions all belong to the owner of the land imm
diately above high water mark, which, it is contended, was not co
veyed.

The deed from the king conveyed the land down to what w
then the upper side of Front street by courses, distances and al
by monuments except on the sea side, "and also the sea beach
front of the same down to low water mark." Below Front stre
as it was then, but along a line that is now in Front street, the
was a bank which was then the line of ordinary high tide. T
high water mark is now, owing to accretions, some distance o
from where the bank was formerly. The action is for all the lan
mostly accretions, below Front street, that is, below a line that
now below the old line of the bank and high water.

The jury were instructed that the deed from the king convey
all the Bates land sued for, and also that the plaintiff had ma
out a complete paper title to that. It is contended that und
204 the former decision the question whether "sea beach" w
intended in the deed from the king in its narrow technic
sense as meaning only the area between high and low water mar
or in its broader, popular sense as including more or less land abo
high water mark, in this case say to the upper side of Front str
or lower boundary of the part described by metes and bounds, shou
have been left to the jury and that the court erred in taking t
question from the jury. The court later in its charge instructed t
jury fully and clearly in accordance with the defendants' view up
this point, leaving the question to the jury, and perhaps this i
struction, in view of its explicit and particular character, shou
be regarded as preventing any harm that might otherwise ha
resulted from the short, general inconsistent instructions just
ferred to, but we will assume otherwise; for, as we view the eviden
the jury could not properly have found differently if they h
understood that the question was open to them.

It is clear, from the reasoning of the former decision (pp. 4(
411), much of which might well be set forth more positively a

forcibly now than was required for the purposes of that decision, that the words "sea beach" as used in the deed from the king presumptively mean all the land both above and below high water mark in front of the part described by courses and distances—although those words would, but for the peculiar circumstances of this case, presumptively mean only the land below high water mark. The function of evidence *aliunde* would be to overcome this presumption but the evidence adduced instead of overcoming the presumption greatly strengthens it. There is, indeed, no evidence entitled to consideration the other way. It was shown (see particularly the testimony of Judge Lyman and Mrs. Ailau, the daughter of Benjamin Pitman, who were thoroughly familiar with the subject at and before as well as after the execution of the deed from the king
205 in 1853) that the area from low water mark to an indefinite distance above the bank or high water mark, at least as far up as the upper side of Front street, was used by the general public for beach purposes, such as hauling canoes on to it, drying fish nets, landing merchandise, piling drift wood, strolling, picknicking, etc., and was commonly known as "beach" or "sea beach," and perhaps also "sand beach," although the last phrase may have been, for greater particularity, more often applied to the part below the bank.

In exceptionally high tide the water washed above the bank and according to some of the testimony at times to the upper side of Front street, up to which, and perhaps further, there was more or less sand at that time. The diagram in the Kalaeloa award and patent above referred to shows that the word "beach" was used at that time in that locality as including more or less land above high water mark. The only testimony pointed out as tending in the other direction consists of two brief passages, one from the testimony of Mrs. Ailau and one from that of James Keliiheleua. That of Mrs. Ailau was on her cross examination by the de*de*fendants, she being a witness for the plaintiff. Even taking this isolated passage by itself it can hardly be construed as tending to show that the witness meant to confine the expression "sea beach" to the land below high water mark, but taking her entire testimony on cross examination alone, and much more so on both direct and cross examination, it is beyond dispute that she meant that the beach was understood to include all up to the upper side of Front street, if not further, and that in the short passage relied on by the defendants she was perhaps in part speaking of the sand beach alone as distinguished from the beach or sea beach and in part using the words in a general way with her thoughts directed to other points just as counsel themselves for the defendants have frequently done in this case. The testimony of the other witness relied on is to the effect that when he was told to go down to the beach and play he would be pointed to the
206 place below high water mark—which would naturally be the place where he would be expected to play, that is, where the water was—and that when asked if he had ever heard foreigners in Hilo speak of the land above the bank as sea beach he replied no. The fact that that witness did not recollect having heard foreigners speak of the land above the bank as sea beach

could not be allowed to overcome the presumptions from the language of the deed itself and the definite, positive testimony of other witnesses to the effect that that was commonly known as "beach" or "sea beach,"—irrespective of any allowances that might properly be made from the weight to be given to the testimony of this witness in view of his mental and physical debilities and the fact that he understood very little English at the time in question. That at most would be but a scintilla of evidence.

4. It is contended (assignments of error 14 and 17) that the verdict is against the law and the evidence as to at least a portion of the accretions in front of the Bates land on the theory that that portion belongs to the owner of adjoining land under the rule of apportionment of accretions between adjoining proprietors.

The general contour of the shore on Hilo bay, on which the Bates land fronts, is a slight concave curve. At the north end of the Bates land there is a sharp projection or tongue of rock extending at right angles to the shore several hundred feet into the bay and tapering or narrowing towards its outer end, at which there is a small wharf. Along this projection Waianuenue street extends to the wharf after crossing Front street. As accretions formed in front of the Bates land, they naturally extended out along the south side of this rock projection and naturally extended out further along the projection than they did at the other end of the Bates land, the new shore line making a curve outward toward the projection.

The defendants argue that the projection is government land (the plaintiff contending that the government has only an ease-
207 ment for street purposes); that, as the jury was instructed, the plaintiff must recover on the strength of his own title; and that the rule of apportionment is correctly stated in the following instruction of the court, which also, they contend, was binding upon the jury whether correct or not.

"If you find that any of the property sought to be recovered in this case consists of accretions to land to which the plaintiff has shown title, then the plaintiff is entitled to his portion or share of said accretions according to the following rule. The new shore line should be divided into parts proportionate to the frontage of the riparian proprietors on the ancient shore line and division lines should then be drawn from the old division points to the new."

This point is not to be favored. The defendants do not pretend to be entitled to the portion of the accretion now claimed to belong to the rock projection, and, of course, seek to have the verdict set aside on this ground merely on the weakness of the plaintiff's case and for the purpose of having it set aside as to the rest of the land. Perhaps the verdict if erroneous in this respect could be sustained upon the filing of a remittitur of the portion of the accretions now in question, but, however that may be, we think it can stand for the entire accretions.

So far as the instruction of the court is concerned it was erroneous. In the first place, without being hypercritical—in view of the position taken by the defendants,—it relates solely to accretions to land

to which the plaintiff has shown title, and which, therefore, *ipso facto*, belong to the plaintiff, and of course he cannot be required to share his own property with others. In the second place, the rule itself, although perhaps the correct one to be applied in general and under ordinary circumstances, does not apply to the present case. The correct and more general rule is that the division of accretions should be equitable with a view to giving each proprietor a fair portion of the accretions and access to the water, in view of the contour and location of the respective lands before the accretions were
208 formed. For instance, the general line of the shore would ordinarily be taken and the relative lengths of frontage upon it irrespective of deep indentations and sharp projections. *Deerfield v. Ames*, 17 Pick. 41; *Fountain v. Grant*, 10 R. I. 477. In the present case there is a sharp projection and it is not clear who owns it or, if there is one owner of the whole of it, how much more of the shore line on the other side of the projection that owner has. The plaintiff may own it. He, moreover, according to the defendants, owns to low water in front of the Bates land, however far out that may be pushed by the accretions; and the accretions, in the sense used by the defendants, were always formed above low water, that is, on, not merely in front of, land that belonged to the plaintiff. There was no beach along the projection. High and low water marks were the same along that. The Bates land and not the projection would have been the loser if there had been attrition instead of accretion. If the rule stated by the court were applied, it would give the projection a broadening instead of a narrowing shape seaward and tend to cut off the access of the Bates land to the bay. A verdict should not be set aside because, perhaps through inadvertence or misunderstanding, the jury failed to observe an erroneous instruction, however much it was their duty to endeavor to observe it. There were not sufficient data before the jury to enable them to make a proper division of the accretion, if any division ought to be made. There was enough to justify them in finding that the accretion all belonged to the land in front of which it was formed.

5. In connection with the defendants' claim of title by adverse possession two errors are alleged. The first (assignment of error 3) is that the court erred in allowing the testimony of Geo. W. Macfarlane taken at a previous trial of the case to be read in evidence against objection. The defendants claim that they and their predecessors have held adversely since 1861, when Spencer acquired title. Spencer held, so far as he held at all, until 1880, or a little short of the twenty years then required by the statute of
209 limitations, when he was succeeded by Macfarlane, who held for four years and then conveyed to the defendants, the Spreckels brothers. The paper title, however, throughout extended down only to Front street, and the object of Macfarlane's testimony was to establish a break in the adverse possession, if there was any adverse possession, of the part below that street, by showing that he, Macfarlane, did not claim title to that part or take possession of it.

Macfarlane had left the Territory for California six or eight months before the trial and had not yet returned, although ap-

parently he had been expected to return before the trial. No motion had been made for a continuance until his return, nor had any attempt been made to obtain his deposition. The trial judge, in admitting the testimony, stated in substance that he did so on the theory that it was a matter within his discretion and that the circumstances, including the indefiniteness as to the time when the case was to be tried, justified this.

It is unnecessary to say whether the testimony was properly admitted or not. See 2 Wigmore, Ev., Sec. 1404. Nor need we say whether the error, if there was error in admitting it, was harmless because, as it is contended, substantially the same testimony was given by another witness, Mr. Reinhart, who, as Macfarlane's agent, was in charge of his Hilo property during the four years in question.

The burden of making out a case of adverse possession was on the defendants. They could accomplish that only by connecting their adverse possession with that of others who had held adversely before them, for their own possession had been far short of the requisite period when this action was begun. If all the testimony tending to show that Macfarlane had not held or claimed adversely were stricken out, there would still be no evidence that he had so, held, at least none has been called to our atention. The jury, moreover, were instructed, and no error is assigned as to this, that the
210 doctrine of "tacking," which was explained, had no application to this case because there was no evidence of any transfer from Spencer to Macfarlane or from Macfarlane to the defendants of any right that Spencer may have acquired in the lands in dispute. Nor would the admission of Macfarlane's testimony affect adversely to the defendants the question, which perhaps was raised in the lower court, whether Spencer had acquired title to the lands in dispute below Front street, by continuing to hold them adversely after he had parted with the title to those above that street, and so whether the title was not out of the plaintiff even if it was not in the defendants.

It is urged, secondly (assignment of error 7), in connection with the claim of adverse possession that the court erred in instructing the jury that unless they were "satisfied by a preponderance of the evidence that the defendants have clearly proven adverse possession," etc., they should find against the defendants on that point. Objection is made to the insertion of the word "clearly." We find no error in this. Davis *v.* Howard, 172 Ill. 340, 344; Roby *v.* Calumet, etc. Co., 211 Ill. 173, 180; Huntington *v.* Whaley, 29 Conn. 391, 398; Illinois Steel Co. *v.* Budzisz, 115 Wis. 68, 84; Baldwin *v.* Shannon, 43 N. J. L. 596, 603; Ward *v.* Cochran, 154 U. S. 597, 606.

6. The defendants contend also (assignments of error 13, 14 and 16) that they are entitled to possession upon the presumption of a lost grant. They make this claim on the law as held in Fletcher *v.* Fuller, 120 U. S. 534, to the effect that, when for a long period of time there has been an absence of any claim of title on the part of the plaintiff and his predecessors and possession on the part of the defendants and their predecessors under claim of title, and no deed to the defendants' predecessors can be found, the jury may find that

the defendants' predecessors had acquired title on the presumption that there was a conveyance which has been lost, and that in making such presumption the jury may consider not merely
211 what may fairly be supposed to have actually occurred but what may have occurred and may be requisite to quiet title in the defendants and solve the difficulties arising from the non-execution of the deed; and that the circumstances may be sufficiently strong to justify an instruction that it is their duty to presume such a conveyance and thus quiet the possession. It is contended that a lost deed from Pitman to Spencer should have been presumed from the undisputed facts which, it is contended, are as follows: In 1860, Pitman, when owning the property above Front street and the beach below and having a store above and using the beach for trading purposes when whale ships came in, advertised an offer to sell his entire business at Hilo, with or without the real estate or any part of it, and later advertised that he had disposed of his business interests at Hilo to Thomas Spencer, and on January 1, 1861, executed two deeds to him, one covering leasehold interests and the other the lots in question down as far as Front street without mentioning the beach,—no bill of sale of the contents of the store being found, although presumably there was one; Spencer took possession of the store and premises and continued to make the same use of the beach as Pitman; a few months later Pitman left these islands not to return and spent the rest of his life in Boston, where he died in 1888 leaving a will in which he made no mention of this beach property, but, on the contrary, in a bequest to his sons, expressed regret that he had "so little to bequeath them;" his widow was residuary legatee and devisee; neither Pitman nor his heirs ever made any claim to the property below Front street after 1860,—the first claim being made by the plaintiff after he had purchased Mrs. Pitman's rights in 1899; Pitman had other real estate on Oahu, Maui and Hawaii, not connected with his business, which he left in charge of attorneys-in-fact who returned them for taxation and gradually sold them off, but who did not return for taxation or otherwise deal with the property in dispute. It is contended that no single act of Pitman or
212 Spencer is inconsistent with the theory that Pitman sold the land to Spencer.

The Court left the question of the presumption of a lost deed to the jury, instructing them as requested by the defendants in accordance with the law as laid down in Fletcher *v.* Fuller, and the defendants have no fault to find in this respect. But they now go further and contend that it was the duty of the jury on the evidence to have presumed a lost deed, and that the evidence was such that as matter of law the court should have directed a verdict, although so far as the record shows that was not requested on this ground, and should have granted the defendants' motion for judgment *non obstante veredicto,* although it does not appear upon what grounds that was asked, and that the verdict should now be set aside as contrary to the law and the evidence.

In our opinion the evidence was such as to permit, if not require, the jury to find against the theory of a lost grant. The

facts in this case are not nearly so strong in support of that theory as the facts were in Fletcher *v.* Fuller, and yet even in that case the court did not say that it was the duty of the jury to presume a lost grant. In that case the time was very much longer—more than a century; there was a complete chain of conveyances of the land during that period under which the defendant claimed, and references in other early deeds tending to indicate that the title was out of the plaintiffs' predecessor and in the defendant's predecessor in title; and the evidence tending to show exclusive possession under claim of ownership on the part of the defendant and his predecessors was very much stronger.

In the present case the plaintiffs' contention, which is in large part at least sustained by the facts as shown by undisputed evidence or as might have been found by the jury, is somewhat as follows:

The entire period in question is only thirty-eight years; this
213 is not the case of an absence of direct proof of a deed of the land in question from Pitman to Spencer in 1861 but the case of a proved deed which omits the land in question below Front street although it includes the land above Front street, in connection with which that below the street is claimed to have been used, and both of which were covered by the earlier deeds to Pitman and his predecessor Bates; similarly Spencer, when he mortgaged the land above Front street to McGrew, did not include the land below that street now in dispute, and the same is true of the conveyance to Macfarlane on foreclosure of that mortgage and the conveyance by Macfarlane to the defendants, the Spreckels brothers; if a lost conveyance is to be presumed from Pitman to Spencer it is equally necessary to presume a lost mortgage from Spencer to McGrew, a lost deed on foreclosure to Macfarlane and a lost deed from the latter to the Spreckels brothers, which would be absurd; Spencer, moreover, did not use the land below Front street except in the same way in which the general public used it, namely, for beach purposes; and when he found himself in financial difficulties he made a lease of all his lands to his son for fifty years, with the privilege of renewal for fifty years, at a small rental, and yet did not include the land in question; when he became bankrupt his trustee in bankruptcy did not claim the land; when he petitioned for discharge from bankruptcy he made oath that he had turned over all his property to the trustees; his successor, Macfarlane, who bought the land above Front street in 1884, did not take possession and made no claim to the land below the street; so of the Spreckels brothers, who bought in 1884, until 1885, when they built a fence along the lower side of the street on this land and in 1889 began to erect buildings or lease portions of the land upon which their tenants erected buildings; until
1889 it was a sort of "nobody's land," as one of the defend-
214 ant's witnesses, who had been their agent with respect to this land, had said.

7. It is contended (assignment of error 9) that there was no evidence of ouster as to the land between high and low water marks. If that were so, that part could be remitted so as to allow the verdict to stand as to the remainder of the land, but in our opinion there

was sufficient evidence to go to the jury on this point. It would seem to be of little or no consequence to either side whether the part between high and low water marks is included in the verdict in this case or not in so far as its inclusion or exclusion depends on this point. The defendants were clearly shown to have been in possession to at least high water mark and indeed admitted that. Each tract sued for, comprising land both above and below high water mark, was treated as a whole through much of the case. Very little evidence would be required to show that the defendants were in possession below high water mark. It was shown by one of the defendant's witnesses that he, the witness, acting as the defendant's agent, built a fence along the lower side of Front street in 1885, thus shutting off from the street all the land below, both above and below high water, and that after buildings began to be erected on this land in 1889 he collected rents on behalf of the defendants for "the property below Front street, the property in dispute below Front street," which of course included what was below as well as what was above high water mark. No distinction was made between these parts by the witness. The defendant's predecessor Spencer also, according to this witness, claimed the land on which the wall was erected by the road authorities in 1874, six or eight feet below the bank, to protect the street from the wash of the sea, which apparently was between high and low water marks.

8. The second of the two grounds of the motion for a new trial (assignment of error 17) is that the trial judge stated in overruling the plaintiff's motion for a directed verdict that he was in favor of the plaintiff but did not want to grant the motion as there
215 was still some doubt in his mind and that if the jury should render a verdict for the defendants and a motion to set aside the verdict should be made he might do so; and that this statement of the judge, although made in the absence of the jury, was published in two newspapers of general circulation in Honolulu and read by several of the jurors before the submission of the case to the jury and read aloud in the jury room by one of the jurors during the deliberations of the jury. This point is argued under the head of misconduct of the jury although in view of the facts it would perhaps more appropriately come under some other head.

The facts are substantially as follows, as shown by the affidavits filed in support of and against the motion for a new trial and the statement of the trial judge in overruling the motion. At the close of the evidence after a trial that lasted several weeks the plaintiff moved for a directed verdict and the jury was excused during the argument of that motion and the settlement of the instructions immediately afterwards. After some argument in support of the motion the judge stopped the argument and, as he says, in order to explain why he stopped the movant and at the same time decided against him, made the statement now in question under the impression that there was no one present who would be likely to report it. Upon the return of the jury one of the defendants' counsel addressed the jury and when within a few minutes of the expiration of his allotted time asked for an adjournment with the privilege

of occupying the remainder of his time the following morning. Shortly before, the bailiff had called the attention of the judge to the following article in that day's Evening Bulletin:

"Favors Plaintiff in Case of Brown-Spreckels.

"The long-drawn suit of Brown *vs.* Spreckels, wherein the plaintiff sues for the possession of a valuable piece of land on the Hilo waterfront, will finally go to the jury today, the indications being decidedly in the favor of the plaintiff. This was shown by a statement made by Judge De Bolt when he gave his ruling on a motion for a directed verdict in favor of the plaintiff.

"Judge De Bolt said that he was inclined in favor of the plaintiff, but did not want to grant the motion for a directed verdict,
216 as there was still some doubt in his mind. He might say, however, that should the jury render a verdict for the defendant and should a motion to set aside that verdict be made, he might do so."

Immediately upon counsel's taking his seat the judge proceeded to admonish the jurors as he usually did upon their separation and further to instruct them not to read the papers of that evening or of the next morning, but to lay them aside and read them later, but had proceeded no further when the same counsel arose and said in substance: "Your Honor I presume refers to the article in the Evening Bulletin. We do not ask for such an order. Let the jurors read the papers, we will take our chances." Whereupon the judge withdrew that part of the instruction to the jury and, as he states, understood that throughout the remainder of the proceedings the jurors were at liberty, with the consent of the defendants, to read those papers. Counsel at the same time made some remark which was understood to mean that he charged opposing counsel with having procured the publication in question. Opposing counsel resented this and when the court convened the next morning asked for an investigation in order to remove from their side of the case the cloud of suspicion which they stated they were under by reason of the remark. The judge discouraged raising a side issue and said that counsel were trying to make a mountain out of a mole hill, but as both parties pressed the matter he proceeded with the investigation, which, however, did not go far before it appeared that the plaintiff and his counsel were wholly blameless in the matter and counsel for the defendants apologized for his remark and opposing counsel accepted the apology and likewise apologized for what had been said on their side. Meanwhile the morning paper, the Advertiser, had been published containing an article entitled, "Long trial now ending. Judge De Bolt leans to plaintiff—Kinney's argument," and containing, among other things, the statement that the judge's denial of the plaintiff's motion for a new
217 trial was "thus reported by an evening paper," quoting the last paragraph of the article above set forth, and continuing:

"As such motions are argued and decided in the absence of the jury, an Advertiser reporter asked Judge De Bolt after adjournment if he desired to say anything on the matter.

"In reply he stated that he did make such an intimation of his view of the case to the attorneys. He did it entirely to save their time in arguing on the motion, but was not aware that any member of the press was present when he made the remarks."

The judge, at the conclusion of the apologies, at once instructed the jury as follows:

"And I will now say to the jurors, and I will instruct them at greater length upon that point, to disregard the whole affair. Gentlemen of the jury, they say difficulties will arise in the best regulated families.

"Gentlemen of the jury, regarding the statements in the evening papers, at least one of them, rehashed in the morning paper, I suppose counsel refer to both, purporting to express or contain supposed views of the Judge of this Court, the way that came about was something like this: Counsel for plaintiff presented a motion, as you are all aware, asking the court to direct a verdict for the plaintiff. You were then excused and counsel for plaintiff proceeded to argue that motion, argued it at some length, perhaps consuming a half an hour or such matter; whereupon I stopped counsel in his argument, making some observations explanatory of my reasons for stopping him and giving him the conclusion that I had reached.

"Whatever remarks were made by the court; whatever intimations or opinions that the court might have expressed or entertained at that time, were made without having heard counsel for the defendant and were not intended to influence the jury. In fact they were only intended for the purpose of explaining the position of the court in stopping the argument at the time it did.

"I think that makes it clear and I will instruct the jury perhaps at greater length and from a little different standpoint at the close of the argument."

Argument to the jury was then resumed. In his charge to the jury the judge instructed them upon this point at length and with great care pointed out their position as judges of the facts, their duties under their oath and directed them to disregard whatever views he had expressed and not to be influenced in any way by the views expressed by him or by what had taken place between counsel. In fact, as all agree, every effort was made by court and counsel on both sides to have the jury disregard the whole matter.

In the jury room, however, the matter was mentioned and,
218 upon some of the jurors stating that they had read the publication in the newspapers and others that they had not, one of the jurors produced a paper—according to the affiant's recollection the Advertiser—and read the report of the judge's remarks aloud.

The defendants contend that the statement of the judge was in effect a comment upon the evidence such as is prohibited by the statute (Rev. Laws, Sec. 1798; Lyman *v.* Hilo Tribune, 13 Haw. 453); that it went even further and was in the nature of a threat to set aside the verdict if it should be rendered for the defendants; that the article in the Advertiser was far more dangerous than that in

the Bulletin inasmuch as it contained an interview with the judge which would remove all doubt as to the correctness of the report; that if there was a waiver it was only of what the Bulletin article contained, as that alone had been published when counsel consented to the jurors reading the papers, or that at most the waiver did not go beyond what might reasonably be expected to be published in the morning paper and that it was beyond the bounds of reasonable expectation that the morning paper should contain the interview with the judge admitting the correctness of the report, in addition to the report itself, and that the waiver, if any, did not extend to the reading of the publication in the jury room when the jury were together as a unit performing their sworn duty of deliberating upon the evidence and in spite of the admonitions of the judge.

The judge, in overruling the motion for a new trial, referred to the length and expense of the trial and to the fact that as he viewed it the verdict was a just one and suggested also that under the common law practice, retained under the federal constitution (Capital Traction Co. *v.* Hof, 174 U. S. 1; Territory *v.* Schilling, 17 Haw. 249, 264; *In Re* Notley Will, 15 Haw. 701), which now governs in these islands, his remarks might properly have been given to the jury directly, at least when coupled with his instructions
219 that they were not binding upon the jury, notwithstanding the statute against commenting upon the evidence. The judge, however, based his opinion mainly upon the ground of waiver. He referred to the fact that, up to the time of counsel's consent that the jurors might read the papers, they had not read them and that from the admonition of the judge not to read the papers of that evening or the next morning they could not have inferred that there was or would be anything in them prejudicial to either side or, if they could infer that, they could not infer to which side it was favorable or prejudicial, and stated that the jurors were intelligent, conscientious citizens and that he had no doubt in his own mind that they would have obeyed his admonition not to read the papers. He stated also that, besides having the jurors admonished, several other avenues were open to counsel, such as going on with the case and finishing it that day without giving the jurors an opportunity to see the papers, or not allowing the jury to separate if the case was continued until the next morning (Acts 75, Laws 1905), or possibly, in case neither of these courses was pursued, he might have moved for a mis-trial the next morning.

In view of these facts and the findings and decision of the trial judge we cannot say that he erred in overruling the motion for a new trial. Counsel for the defendants, upon having their attention called to the first publication did not do what they could or assist the court, towards preventing the matter from coming to the attention of the jury but actually frustrated the attempt of the court to accomplish that result and expressly stated that the jurors might read the papers—the morning as well as the evening paper—and that they were willing to take their chances. Their position might have been different if they had done or acquiesced in the doing of what might have been done in that direction and if the attempt had

failed. The most plausible ground that they can take now is
220 that the Advertiser article was more dangerous than the other and was read in the jury room notwithstanding the instructions of the court, and that some of the jurors had not up to that time read that article or perhaps the Bulletin article. They, however, did not raise any objections in regard to the Advertiser article after they, and presumably the jurors, or many of them, had read it, or to the remarks of the judge and counsel in regard to it before the case was submitted to the jury. Indeed, it would probably have been easy to have prevented the morning paper from referring to the matter at all; at any rate, apparently no attempt was made to do so. We cannot say that the Advertiser article was materially more prejudicial than the Bulletin article, especially as the contents of the Bulletin article were not of such a nature as to suggest that the report was incorrect and the remarks of the judge and counsel that afternoon were such as to assume the correctness of the report; but if the Advertiser article was more prejudicial the defendants cannot claim now that they did not waive its reading by the jury. They expressly consented to that in advance and were willing to take their chances, as they said. Moreover, that article is claimed to have been more prejudicial, solely because of the judge's acknowledgment of its correctness, but the judge practically did the same directly to the jury when, referring expressly to the morning paper as well as the evening paper, he explained the matter to the jury in the passage above quoted immediately after the exchange of apologies by counsel and no objection was taken to those remarks. It seems to have been taken for granted that all the jurors knew the tenor of the publication before the case was submitted to them and, if it was not, it might as well have been in view of all that had taken place in their presence. It may have been that some of the jurors had not read the Advertiser article and perhaps not even the Bulletin article, but they must all have known their gist. There was no direction nor
221 was there any request to the effect that the articles, or either of them, should not be read or their contents stated or referred to by the jurors after their retirement. They were directed in substance merely not to allow the remarks of the court as published to have any influence upon them in arriving at a verdict. Nothing would be more natural, after all that had occurred, than for some reference to be made to the publications in the jury room. The reading of one of the articles there was no worse than would have been a statement by one of the jurors as to its contents. This might naturally have been done or the publications have been referred to in various ways as a result of questions prompted by curiosity or for passing the time during lengthy deliberations or for other harmless reasons. It does not appear nor is there any reason to believe that the jurors disregarded the instructions of the judge not to permit the publications to weigh with them or that they were influenced by anything that took place in regard to the publications in the jury room. The case might have been different if they had been ignorant of the whole matter when they retired. The harm, if any, that was done was done already before they retired. It some-

times happens that matters occurring are so prejudicial in their very nature that their harmful effects cannot be cured by an instruction of the judge to disregard them. If that were the case here, it would still be true that the prejudicial matters were consented to and waived by the defendants so that they cannot complain even if the harm was not cured. Mere reference in the jury room to matters which the jurors already knew would not show that they disregarded the instruction of the court to endeavor not to be influenced by them. Some of the jurors had read both publications and all must have known their substance, no objections had been made to references to them in the presence of the jury that morning and they had in the most open and unqualified manner been given leave to
222 read both papers and no attempt was made at any time by counsel for the defendants to prevent further knowledge of the publications or their contents on the part of any of the jurors whose knowledge might have been incomplete up to the time of the submission of the case to them. It cannot be said that any harm was done for which the defendants' counsel were not to blame or in which they did not acquiesce or in regard to which they had not stated unequivocally that they were willing to take their chances.

It is contended further (assignment of error 15), that the trial court erred in admitting the affidavits of each of the twelve jurors to the effect that they would have heeded the request of the judge not to read his published remarks had not the defendants' counsel said that he had no objection to their reading them that they understood from the remarks both of counsel for the plaintiff and the judge, that they were not to consider them or be influenced by them in any way; and that they rendered their verdict impartially and upon the merits without any regard to the remarks. These affidavits should not have been admitted. If the trial judge had based his decision upon them the result at most would be not the reversal of the verdict and the ordering of a new trial, but the reversal of the decision on the motion for a new trial and a remand of the case to the judge for passing again upon that motion. But apparently the decision was uninfluenced by these affidavits and would have been precisely the same if they had been rejected and in our opinion that decision was right.

The judgement of the circuit court is affirmed.

(Signed) W. F. FREAR.
(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.

J. A. Magoon and J. Lightfoot for the plaintiff.

W. A. Kinney and S. M. Ballou (Kinney, McClanahan & Derby and Ballou & Marx on the brief) for defendants.

Endorsed: Supreme Court, Territory of Hawaii. Charles A. Brown *v.* John D. Spreckels, *et al.* Opinion. Filed November 15, 1906. J. A. Thompson, Clerk.

223 In the Supreme Court of the United States, October Term, 1906.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Writ of Error to the Supreme Court of the Territory of Hawaii.

Order for the Transmission of Original Exhibits.

To Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii:

You are hereby authorized and directed in connection with the writ of error from the Supreme Court of the United States in the above entitled suit, to transmit as part of the record if required by præcipe of the plaintiffs in error, the following exhibits upon their counsel undertaking to return them to the files of this Court:

Plaintiff's Exhibit "G," Copy of portion of Gov't Registered Map No. 1061,
" " "H," Copy of portion of Gov't Registered Map No. 1062,
" " "I," Copy of portion of Gov't Registered Map No. 1561,
" " "J," Copy of portion of Gov't Registered Map No. 2210,
" " "K," Copy of portion of Gov't Registered Map No. 1719,
" " "L," Photograph of Water Front Hilo,
" " "M," " " " " " "
" " "N," " " " " " "
" " "O," " " Buildings,
Plaintiff's Exhibit "R," Photograph of Water Front Hilo, 1875.

(Signed) W. F. FREAR,
Chief Justice Supreme Court of the Territory of Hawaii.

Honolulu, T. H., March 21, 1907.

224 Endorsed: In the Supreme Court of the United States. October Term, 1906. J. D. Spreckels, Adolph Spreckels and C. C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron, Plaintiffs in Error *vs.* Charles A. Brown, Defendant in Error. Order for the Transmission of Original Exhibits. Filed March 23, 1907, at 10:30 o'clock A. M. J. A. Thompson, Clerk Supreme Court, Territory of Hawaii.

225 In the Supreme Court of the Territory of Hawaii.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUS SPRECKELS, Partners under the Name of J. D. Spreckels Bros and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDE W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETE MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs i Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII, *Honolulu, Oahu, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory o Hawaii, do hereby certify that the foregoing pages numbered fro 1 to 224 inclusive together with certain original exhibits herewit transmitted, contain a full, true correct and complete transcript o the record and proceedings had in the said Supreme Court of th Territory of Hawaii in the case entitled in said Court, "Charle A. Brown *vs.* John D. Spreckels, Adolph B. Spreckels and C. Augu Spreckels, partners under the name of J. D. Spreckels Bros., an A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tan Sing and Mrs. John Utterstron," as required by the præcipe of th attorneys for the plaintiffs in error attached hereto.

In testimony whereof I have hereunto set my hand and caused th seal of the said Supreme Court of the Territory of Hawaii, to be here unto affixed at Honolulu in said Territory this first day of Apri A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

226 In the Supreme Court of the Territory of Hawaii.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUS SPRECKELS, Partners, Doing Business under the Firm Name o J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWON WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOH UTTERSTRON, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Certificate of Clerk to Documents Sent Up.

TERRITORY OF HAWAII, *Honolulu, Oahu, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory Hawaii, hereby certify that the original Writ of Error, Citatio

Admission of Service, and Order Extending Time for forwarding Transcript of Record, as the same are on file and of record in my office are hereto attached and herewith transmitted to the Supreme Court of the United States, and that true and correct copies of the Final Judgment, Petition for Writ of Error, Order Allowing Writ of Error, Affidavit of Value, Bond on Writ of Error and Assignment of Errors, as the same are on file and of record in my office, are also hereto attached.

I do further certify that the said original Writ of Error and a copy of the same for the Defendant in Error and also the original of said Bond were lodged in my office on the 22nd day
227 of November, A. D. 1906.

In testimony whereof I have hereunto set my hand and caused the seal of said Supreme Court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory of Hawaii this 29th day of December, A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

228 In the Supreme Court of the United States, October Term, 1906.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Ejectment.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court
229 of the Territory of Hawaii, before you or some of you, being the highest Court of Law or Equity in said Territory in which a decision could be had in said suit between John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and

Mrs. John Utterstron, Plaintiffs in Error, and Charles A. Brown Defendant in Error, wherein was in question a matter where th amount involved, exclusive of costs, exceeded the sum of Fiv Thousand Dollars ($5,000.), a manifest error hath happened to th great damage of the said John D. Spreckels, Adolph B. Spreckel and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Ke C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron, as b their complaint appears, we being willing that error, if any hat been, should be duly corrected and full and speedy justice done t the parties aforesaid, in this behalf do command, if judgment b therein given, that then under your seal, definitely and openly, yo send the record and proceedings aforesaid, with all things concernin the same, to the Supreme Court of the United States, together wit this Writ, so that you have the same at Washington within Sixt (60) days from the date hereof, in the said Supreme Court to b then and there held; that the record and proceedings aforesaid bein inspected the said Supreme Court may cause further to be don therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justic
230 of the said Supreme Court of the United States the 22nd da of November in the year of our Lord One Thousand Nin Hundred and Six.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court of the Territory of Hawaii.

Allowed by:

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii, November 22, A. D. 1906.

231 [Endorsed:] No. 114. Reg. 1/88. Supreme Court Unite States. John D. Spreckels, *et. al. vs.* Charles A. Brown Writ of Error, &c. Filed Nov. 22, 1906. Henry Smith, Clerk Su preme Court, Hawaii. Kinney, McClanahan & Derby, 303-305 Jud Bldg., Honolulu, Attorneys for Pl'ffs in Error. (Office No. —.)

232 In the Supreme Court of the United States, October Term, 1906.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Ejectment.

Citation to Defendant in Error.

The United States of America to Charles A. Brown, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within Sixty (60) days from the date hereof, pursuant to a Writ of Error filed in the Office of the Clerk of the Supreme Court of the Territory of Hawaii, wherein John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners, doing business under the firm name of J. D. Spreckels Bros., and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing
233 Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing, and Mrs. John Utterstron are Plaintiffs in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, the 22nd day of November, A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

234 [Endorsed:] No. —. Supreme Court, United States. John D. Spreckels, *et al. vs.* Charles A. Brown. Citation to Def't in Error. Filed Nov. 22, 1906. Henry Smith, Clerk Supreme Court, Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for Pl'ffs in Error. (Office No. —.)

235 In the Supreme Court of the United States, October Ter
1906.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGU
SPRECKELS, Partners, Doing Business under the Firm —
J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S.
GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWO
WA KEE, A. AHO, PETER MIGUEL, TANG SING, and MRS. JO
UTTERSTROM, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Ejectment.

Admission of Service.

Service of copies of the Writ of Error, Citation, Assignment
Errors, Affidavit of Value, Bond on Writ of Error, Order Allowi
Writ of Error and Petition for Writ of Error in the above cause
hereby admitted this 22nd day of November, A. D. 1906.

MAGOON & LIGHTFOOT,
HOLMES & STANLEY,
Attorneys for Defendant in Error.

236 [Endorsed:] No. 114. Reg. 1/88. Supreme Court, Unit
States. John D. Spreckels, *et al. vs.* Chas. A. Brown. A
mission of Service. Filed Nov. 23, 1906, at 8:45 A. M. Her
Smith, Clerk Supreme Court, Hawaii. Kinney, McClanahan
Derby, 303-305 Judd Bldg., Honolulu, Attorneys for Pl'ffs in Err
(Office No. —.)

237 In the Supreme Court of the United States, October Ter
1906.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGU
SPRECKELS, Partners, Doing Business under the Firm Name
J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S.
GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWO
WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JO
UTTERSTROM, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Writ of Error from the Supreme Court of the Territory of Haw

Order Extending Time for Forwarding Record.

Good cause appearing therefor and pursuant to Section 1 of R
9 of the Supreme Court of the United States, it is hereby orde
that the Plaintiffs in Error herein be and they hereby are allo

until March 1st, 1906, within which to file the record in the above cause in the Supreme Court of the United States.

Dated Honolulu, Territory of Hawaii, December 21, A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

238 [Endorsed:] No. —. Supreme Court of the United States. John D. Spreckels, *et al. vs.* Charles A. Brown. Order Extending Time for Forwarding Record. Filed December 21, 1906. Henry Smith, Clerk Supreme Court, Ter. of Hawaii. Kinney, McClanahan & Derby, 302-305 Judd Bldg., Honolulu, Attorneys for Pl'ffs in Error. (Office No. —.)

239 In the Supreme Court of the Territory of Hawaii.

CHARLES A. BROWN, Defendant in Error,

vs.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error.

Ejectment.

Final Judgment.

The above cause having come duly on to be heard on a Writ of Error to that certain Judgment filed on March 16th, A. D. 1906, in that certain action of ejectment in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, numbered Law No. 5037, wherein Charles A. Brown was Plaintiff and John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners, doing business under the firm name of J. D. Spreckels Bros., and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron were defendants, by which Judgment it was adjudged that said Charles A. Brown, the Defendant in Error herein, recover of the Plaintiffs in Error herein the following described lands and premises:

First. That certain piece or parcel of land situate in Hilo, Island, County and Territory of Hawaii, being a portion of the land conveyed by Kamehameha III to Elizabeth G. I. Bates by deed dated the 19th day of September, 1853, and recorded in the Regis-
240 try Office Oahu in Liber 5, page 587 and more particularly bounded and described as follows:

Beginning at the present South corner of Front St. Waianuenue St., the said point being the original North angle of the lot conveyed by B. Pitman to Thos. Spencer, Lib. 13 Folio 384, the boundary runs by the true meridian.

1. S. 24° 48′ E. 192.0 ft. Along the West edge of Front St. to E. angle this piece
2. N. 65° 12′ E. 186.0 ft. Along accreted extensions to point at sea beach at low water mark, thence following around the line of said sea beach at low water mark (1899) by a curve to the left of radius of 251.5 ft. the direct bearing length of chord being
3. N. 12° 41′ W. 232.0 ft. Thence
4. S. 56° 48′ W. 238.0 ft. Along the line of accreted extensions on the North line of the Bates property to point of beginning.

Containing an area of 39639 sq. ft. more or less, reserving however therefrom the area now occupied as a public roadway and known as Front St.

Second. That certain piece or parcel of land situate at Hilo, Island, County and Territory of Hawaii, being a portion of the land described in Royal Patent 4894, Land Commission Award 1144, and more particular described as follows:

Beginning at the North angle of lot described in deed from B. Pitman to Thos. Spencer Lib. 13 folio 384, the boundary runs by the true meridians

1. S. 23° 25′ E. 22 ft. to East angle;
2. N. 67° 10′ E. 92 ft. to East angle of Kong Hip Chan Building;
3. N. 22° 50′ W. 28 ft. to North line of accreted extension of L. C. A. 1144, this property;
4. S. 65° 20′ W. 92 ft. along same to point of beginning.

241 Containing an area of 2300 sq. ft. more or less, reserving however the area now occupied as a public roadway, known as Front Street; and also his costs taxed at One thousand three hundred and thirty eight dollars ($1338.00).

And it appearing to the Court after due consideration and argument of counsel for all parties that said Judgment should in all respects be Affirmed for reasons which more fully appear from its opinion and decision herein filed, on the 15th day of November, A. D. 1906.

Now therefore it is hereby ordered and adjudged that said Judgment be and the same hereby is Affirmed in all respects, with costs taxed to the Plaintiffs in Error.

Dated, Honolulu, November 22, A. D. 1906.

By the Court:

[SEAL.] (Signed) J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed: No. 114. Reg. 1/88. Supreme Court Territory of Hawaii. Charles A. Brown *vs.* John D. Spreckels, *et al.* Final Judgment. Filed November 22d, 1906, at — P. M. J. A. Thompson, Clerk. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu. Attorneys for Pl'ffs in Error. (Office No. —.)

242 In the Supreme Court of the Territory of Hawaii.

CHARLES A. BROWN, Defendant in Error,

vs.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error,

Ejectment.

Petition for Writ of Error and Supersedeas from the Supreme Court of the United States.

To the Honorable W. F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii:

Your petitioners, John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners, doing business under the firm name of J. D. Spreckels Bros., and A. G. Serrao, D. Lycurgus, S. C Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing, and Mrs. John Utterstron, plaintiffs in error in the above cause, respectfully represent and show:

That on the 22nd day of November, A. D. 1906, the Supreme Court of the Territory of Hawaii rendered and entered a final judgment in the above cause, in favor of the Defendant in Error, therein and against these Plaintiffs in Error, which said judgment involved more than the amount of Five Thousand Dollars ($5,000.) exclusive of costs, in which said judgment and the proceedings had prior thereto in said cause certain errors were committed to the
243 prejudice of these Plaintiffs in Error, all of which will more in detail appear from the assignment of errors which is filed with this petition;

Wherefore, and because your petitioners are aggrieved by said judgment, they pray that a Writ of Error may issue in their behalf out of the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent up to the said Supreme Court of the United States, and also that an order be made fixing the amount of security which your petitioners shall give and furnish upon said Writ of Error, and that upon the giving of such security

all further proceedings in the above cause be suspended and stayed until the determination of the Writ of Error by the Supreme Court of the United States.

Dated, Honolulu, November 22, A. D. 1906.

(Signed) KINNEY, McCLANAHAN & DERBY,
S. H. D.

(Signed) BALLOU & MARX,
Attorneys for Plaintiffs in Error.

Endorsed: No. 114. Reg. 1/88. Supreme Court Territory of Hawaii. Charles A. Brown *vs.* John D. Spreckels, *et al.* Petition for Writ of Error, &c. Filed Nov. 22, 1906, at 3 P. M. Henry Smith, Clerk. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu. Attorneys for Pl'ffs in Error. (Office No. —.)

244 In the Supreme Court of the Territory of Hawaii.

CHARLES A. BROWN, Defendant in Error,
vs.
JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error.

Ejectment.

Order Allowing Writ of Error and Supersedeas from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii.

The above entitled matter coming before me upon the petition of the Plaintiffs in Error therein for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii, and upon examination of said petition and the record in said matter, and desiring to give the said Plaintiffs in Error an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter,

It is hereby ordered that a Writ of Error be and the same hereby is allowed from the Supreme Court of the United States to
245 the Supreme Court of the Territory of Hawaii in the above cause, and that a supersedeas bond for costs and damages in the penal sum of *Ten Thousand Dollars* ($10,000.00), herewith presented by said Plaintiffs in Error, be and the same is hereby approved; and that all further proceedings in the above cause be suspended and stayed until the determination of said Writ of Error by the Supreme Court of the United States.

Dated, Honolulu this 22nd day of November, A. D. 1906.

[SEAL.] (Signed) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: No. 114. Reg. 1/88. Supreme Court Territory of Hawaii. Charles A. Brown *vs.* John D. Spreckels, *et al.* Order Allowing Writ of Error &c. Filed Nov. 22, 1906, at 3 P. M. Henry Smith, Clerk. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu. Attorneys for Pl'ffs in Error. (Office No. —.)

246 In the Supreme Court of the United States, October Term, 1906.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Ejectment.

Affidavit of Value.

UNITED STATES OF AMERICA,
Territory of Hawaii, Honolulu, ss:

Walter M. Giffard being first duly sworn, on oath deposes and says: That he is well acquainted with the land sought to be recovered in the above entitled cause and described in the complaint therein by metes and bounds, said premises consisting of land makai or on the sea side of Front Street in the town of Hilo, and forming part of the premises conveyed by Kamehameha III to E. C. Bates by Deed dated September 19th, A. D. 1853, and recorded in the Registry of Deeds in Honolulu, and L. C. A. No. 1144 to Kalaeloa; that the premises in question sought to be recovered in this suit consist of accretions that extend so far out into the sea as to have permanent land suitable for building purposes between the sea and the makai or sea side of Front Street; that Front Street in that vicinity constitutes a business section of the town of Hilo,
247 and for many years last past the accretions in question have been occupied by buildings used for business purposes, such as stores, etc.; that Front Street, as its name implies, is a public thoroughfare running parral-el with the water front of the town of Hilo and being the street next to the sea; that the land in question is bounded on one side by Front Street and on the Westerly side by Waianuenue Street, and across on the other side of Waianuenue Street is the public Postoffice of said Hilo, and some of its chief stores are on Front Street opposite the land in question; that said accretions have become permanent, and are suitable, as aforesaid, for the erection of permanent buildings; that affiant is the agent of the defendants John D. Spreckels and Adolph B. Spreckels and is well

acquainted with the land in question and the rentals obtained therefrom for many years last past; that the rentals have been less than they should have been owing to the fact that the title to said land has been in doubt and under dispute, so that the structures erected thereon have been of the most temporary character and have all been put up by the tenants themselves, Spreckels Bros. merely collecting ground rent therefor.

That the doubt as to the title above referred to was in the first instance chiefly as to possible claims by the Government of Hawaii, but that later another claim was set up by the Defendant in Error herein, and that the result has been to forbid the erection of suitable structures thereon; that the location of the land is such as will always give it value for business purposes, as water-front property, said property having a frontage on Front Street of over Two Hundred (200) feet, and affiant unhesitatingly avers that the land covered by the complaint herein is and at the same time this suit was brought was and ever since has been of the value of over Five Thou-
248 sand Dollars ($5,000.);

Affiant further avers that in March of this year the Defendant in Error, Charles A. Brown, commenced an action for mesne profits against the aforesaid John D. Spreckels and Adolph B. Spreckels in which he claimed as mesne profits the sum of Twenty-five Thousand Dollars ($25,000.) for the occupation of the land in question and certain other smaller pieces of land not so valuable as the land in question.

And further affiant sayeth not.

(Signed) W. M. GIFFARD.

Subscribed and sworn to before me this 22nd day of November, A. D. 1906.

[SEAL.] (Signed) J. S. WALKER,
Notary Public, First Judicial Circuit
Territory of Hawaii.

Endorsed: No. —. Supreme Court United States. John D. Spreckels *et al. vs.* Charles A. Brown. Affidavit of Value. Filed Nov. 22, 1906. Henry Smith, Clerk Supreme Court, Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu. Attorneys for Pl'ffs in Error. (Office No. —.)

249 In the Supreme Court of the United States, October Term, 1906.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error,

vs.

CHARLES A. BROWN, Defendant in Error.

Ejectment.

Bond on Writ of Error.

Know all men by these presents that we, John D. Spreckels and Adolph B. Spreckels, as Principals, and Richard Ivers and E. I. Spalding, as Sureties, are held and firmly bound unto Charles A. Brown in the penal sum of Ten Thousand Dollars ($10,000.00) to the payment of which well and truly to be made we bind ourselves, our successors, heirs, executors and administrators, jointly and severally by these presents.

The condition of this obligation is such that:

Whereas in a suit pending in the Supreme Court of the Territory of Hawaii between John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron, as Plaintiffs in Error, and Charles A. Brown, as Defendant in Error, judgment was rendered against said Plaintiffs in Error, and said Plaintiffs
250 in Error having obtained a Writ of Error and filed a copy thereof in the office of the Clerk of said Supreme Court of the Territory of Hawaii, to reverse the judgment in said suit, together with the citation directed to the said Charles A. Brown, citing and admonishing him to be and appear before the Supreme Court of the United States held at the City of Washington in the District of Columbia;

Now therefore if the said John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron shall prosecute their said Writ of Error to effect, and pay all costs and damages if they shall fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In witness whereof the said John D. Spreckels, and Adolph B. Spreckels have caused this bond to be executed in their behalf by W. M. Giffard, their Attorney-in-fact, and the said E. I. Spalding

and Richard Ivers have hereunto set their hands and seals this 22nd day of November, A. D. 1906.

JOHN D. SPRECKELS,
(Signed) By His Attorney-in-Fact, W. M. GIFFARD.
ADOLPH B. SPRECKELS,
(Signed) By His Attorney-in-Fact, W. M. GIFFARD.
(Signed) RICHARD IVERS.
(Signed) E. I. SPALDING.

Approved:
(Signed) W. F. FREAR,
Chief Justice, Supreme Court, Hawaii.

Nov. 22, 1906.

Endorsed: No. —. Supreme Court United States. John D. Spreckels *et. al. vs.* Charles A. Brown. Bond on Writ of Error. Filed Nov. 22, 1906. Henry Smith, Clerk Supreme Court, Hawaii. Kinney, McClanahan & Derby, 303-305 Judd Bldg., Honolulu, Attorneys for Pl'ffs in Error. (Office No. —.)

251 In the Supreme Court of the Territory of Hawaii.

CHARLES A. BROWN. Defendant in Error,
vs.
JOHN D. SPRECKELS, ADOLPH B. SPRECKELS, and C. AUGUST SPRECKELS, Partners, Doing Business under the Firm Name of J. D. Spreckels Bros., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON, Plaintiffs in Error.

Ejectment.

Assignment of Errors.

Now come John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron, Plaintiffs in Error herein, and respectfully submit:

That in the record, proceedings, decision and final judgment of the Supreme Court of the Teritory of Hawaii in the cause entitled—"Charles A. Brown, Defendant in Error, *vs.* John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners doing business under the firm name of J. D. Spreckels Bros. and A. G. Serrao, D. Lycurgus, S. C. Guerera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing and Mrs. John Utterstron, Plaintiffs in Error", in which final judgment of said Supreme Court of the Territory of Hawaii was rendered and entered on the 22nd day of November, A. D., 1906, the said

Plaintiffs in Error having obtained a Writ of Error on said
252 judgment of said Supreme Court of the Territory of Hawaii to the Supreme Court of the United States, at Washington, in the District of Columbia, assign for error in the record and judgment aforesaid and in the proceedings had in said cause, before said judgment, the following:

I.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered One to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be overruled, said assignment of error reading as follows:—

"1. That the Court erred in admitting in evidence the release from Martha B. Pitman to Charles A. Brown, dated August 2, 1899, and purporting to release the premises in controversy in this suit."

II.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Two to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"2. That the Court erred in denying the motion of defendants in the Court below for a non-suit."

III.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Three to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"3. That the Court erred in allowing the testimony of George W. Macfarlane taken at a prior trial of this case to be read in evidence to the jury against the objection of counsel for the defendants."

253 IV.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Four to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"4. That the Court erred in giving the following instruction to the jury: 'I instruct you that the words "also the sea beach in front of the same down to low water mark" used in the Deed of Kamehameha III to Elizabeth J. I. Bates, covering the land described in Exhibit A.' (Plaintiff's Instruction No. 2)."

V.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error num-

bered Five to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"5. That the Court erred in giving the following instruction to the jury: 'I instruct you that the words "with the right of extension to low water mark" used in the Deed from Kalaeloa to Pitman, together with the other particular descriptions contained in said deed, covers the land described in Schedule B.' (Plaintiff's Instruction No. 3)."

VI.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Six to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"6. That the Court erred in giving the following instruction to the jury: 'I instruct you that the Plaintiff has made out a complete paper title to the two pieces of land described in Schedules A. and B. attached to his complaint', (Plaintiff's Instruction No. 5)."

254 VII.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Seven to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"7. That the Court erred in giving the following instruction to the jury: 'I charge you that the defendants in this case rely for one defense upon adverse possession. The burden of proving this defense is upon defendants; unless you are satisfied by a preponderance of the evidence that the defendants have clearly proven adverse possession as defined in these instructions, you will find against the defendants upon that point,' (Plaintiff's Instruction No. 6)."

VIII.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Eight to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"8. That the Court erred in refusing to give the following instructions duly requested in writing by the defendants: 'I instruct you that the Plaintiff has shown no title to any of the land lying east of King Street, lying between present high water and low water mark, and as to such land, you must find for the defendants', (Defendants' Request for Instruction No. 13)."

IX.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Nine to the ruling of the Circuit Court of the First Circuit

of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"9. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: 'I
255 charge you that there is no evidence that the defendants have deprived the plaintiff of the possession of any property below high water mark, and in the absence of evidence of ouster your verdict must be for the defendants for such property', (Defendants' Request for Instruction No. 14)."

X.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Ten to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"10. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: 'Unless you find that the plaintiff had some interest in or possession of some part of the premises described in the release from Martha B. Pitman to himself at the date of the delivery of said deed, such release would pass no title to the premises therein described', (Defendants' Request for Instruction No. 24)."

XI.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Eleven to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"11. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: 'I instruct you that the Deed from Kamehameha III to E. G. I. Bates conveyed only the space included in the surveyed portion, together with the land between high and low water marks in front of the same,' (Defendants' Request for Instruction No. 25)."

XII.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Twelve to the ruling of the Circuit Court of the First
256 Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"12. That the Court erred in refusing to give the following instruction duly requested in writing by the defendants: 'I instruct you that the Deed of the Kalaeloa premises from Kalaeloa to Pitman did not convey the fee simple title to any land below the upper side of Front Street', (Defendants' Request for Instruction No. 26)."

XIII.

That said Supreme Court of the Territory of Hawaii errred in holding and deciding that Plaintiffs' in Error assignment of error num-

bered Thirteen to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"13. That the Court erred in denying defendants' request for a directed verdict for defendants."

XIV.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Fourteen to the verdict of the jury in the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"14. That the verdict rendered in said cause was and is contrary to the law and the evidence."

XV.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Fifteen to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"15. That the Court erred in admitting in evidence on Motion for new trial the affidavits of H. P. Benson, James E. Jaeger, Thos. W. Chase, P. Lishman, Wm. Buckle, H. W. Doane, H. G. Cowan, E. G. Fuller, Chas. H. Pfeiffer, M. Mellis, Jno. Michell and F. C. Atherton jurors in said cause, filed as reply affidavits by plaintiff."

257 XVI.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Sixteen to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"16. That the Court erred in denying the Motion for the defendants in the Court below for judgment *non obstante veredicto*."

XVII.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding that Plaintiffs' in Error assignment of error numbered Seventeen to the ruling of the Circuit Court of the First Circuit of the Territory of Hawaii should be over-ruled, said assignment of error reading as follows:—

"17. That the Court erred in over-ruling the Defendants' motion for a new trial."

XVIII.

That said Supreme Court of the Territory of Hawaii on a Writ of Error taken by the Plaintiffs in Error to the judgment of the Circuit Court of the First Circuit, filed March 16th, A. D. 1906, erred in holding and deciding that a Deed of release when made for a consideration might be construed as a deed of bargain and sale in

order to effectuate the intention of the parties and avoid its validity because of the Releasee's want of possession.

XIX.

That said Supreme Court of the Territory of Hawaii on said Writ of Error taken by the Plaintiffs in Error, as aforesaid, erred in holding and deciding that even if such a Deed of release
258 would not be valid under such circumstances at common law, it would be valid in the Territory of Hawaii under Hawaii-n usage and decisions.

XX.

That said Supreme Court of the Territory of Hawaii on said Writ of Error taken by Plaintiffs in Error, as aforesaid, erred in holding and deciding that Defendant in Error's title to the Kalaeloa land extended to low water mark.

XXI.

That said Supreme Court of the Territory of Hawaii on said Writ of Error taken by the Plaintiffs in Error, as aforesaid, erred in holding and deciding that the words "With the right of extension to low water mark", in the Deed of the Kalaeloa land, carried the fee to low water mark.

XXII.

That said Supreme Court of the Territory of Hawaii on said Writ of Error taken by the Plaintiffs in Error, as aforesaid, erred in holding and deciding that the words "And also the sea beach in front of the same down to low water mark", in the Deed of the Bates land, including the area between the lower course and distance boundary and high water mark as well as the area between high and low water mark.

XXIII.

That said Supreme Court of the Territory of Hawaii on said Writ of Error taken by the Plaintiffs in Error, as aforesaid, erred in holding and deciding the rule that accretion should be divided between adjoining proprietors so as to give them new shore lines proportionate with the old, did not apply in this case.

259 XXIV.

That said Supreme Court of the Territory of Hawaii on said Writ of Error taken by the Plaintiffs in Error, as aforesaid, erred in holding and deciding that the accretions sued for were correctly apportioned by the jury in the Circuit Court of the First Circuit, in spite if instructions to the contrary by the trial judge.

XXV.

That said Supreme Court of the Territory of Hawaii on said Writ of Error taken by the Plaintiffs in Error, as aforesaid, erred in holding and deciding that the reading of the testimony of George W. Macfarlane given at a former trial of the case at Bar, said Mac-

farlane being then absent from the Territory, was not prejud
error.

XXVI.

That said Supreme Court of the Territory of Hawaii on
Writ of Error taken by the Plaintiffs in Error, as aforesaid, e
in holding and deciding that there was no evidence of adv
possession on the part of the Plaintiffs in Error.

XXVII.

That said Supreme Court of the Territory of Hawaii on
Writ of Error taken by the Plaintiffs in Error, as aforesaid, e
in holding and deciding that this was not a case for tacking adv
possession.

XXVIII.

That said Supreme Court of the Territory of Hawaii on
Writ of Error taken by the Plaintiffs in Error, as aforesaid, e
in holding and deciding that it was not the duty of the jur
find a lost deed from Benjamin Pitman to Thomas Spencer.

260 XXIX.

That said Supreme Court of the Territory of Hawaii on
Writ of Error taken by the Plaintiffs in Error, as aforesaid, e
in holding and deciding there was sufficient evidence of ouste
the case at Bar.

XXX.

That said Supreme Court of the Territory of Hawaii on
Writ of Error taken by the Plaintiffs in Error, as aforesaid, e
in holding and deciding that the remarks of the trial Judge on
argument on the motion for a direct verdict, that if the jury sh
render a verdict for the defendants and a motion to set aside
verdict should be made, he might do so, together with the publica
of accounts of said remarks in the newspapers and the readin
said newspapers by the jury in the jury-room and elsewhere, did
constitute a good ground for a new trial.

XXXI.

That said Supreme Court of the Territory of Hawaii on
Writ of Error taken by the Plaintiffs in Error, as aforesaid, e
in holding and deciding that the judgment of the Circuit Cou
the First Circuit should be affirmed.

XXXII.

That said Supreme Court of the Territory of Hawaii on
Writ of Error taken by the Plaintiffs in Error, as aforesaid, e
in rendering and entering final judgment on the — day of Novem
A. D. 1906, against the Plaintiffs in Error.

XXXIII.

That said Supreme Court of the Territory of Hawaii erred
holding and deciding on the 29th day of August, A. D. 1902, w

the cause between the Plaintiffs in Error and the Defendant in Error came up on a Bill of Exceptions duly taken to certain
261 rulings of the Circuit Court of the Fourth Circuit, at the second trial of said cause, wherein the Defendant in Error was non-suited, that the beach between high and low water marks could be granted to private persons before the annexation of the Hawaiian Islands to the United States.

XXXIV.

That said Supreme Court of the Territory of Hawaii erred in holding and deciding on said Bill of Exceptions taken, as aforesaid, that Crown lands, the Bates land being Crown property, were alienable by the King in the year 1853, the time of the conveyance by King Kamehameha III to Elizabeth G. J. Bates.

Wherefore and on account of said manifest errors and each of them, all of which errors appear on the record of said cause, and in the decision and judgment of said Supreme Court of the Territory of Hawaii, said Plaintiffs in Error, above named, pray that the judgment of said Supreme Court of the Territory of Hawaii, in said cause, may be reversed, and that said Supreme Court of the Territory of Hawaii be ordered to enter judgment in said cause for the Plaintiffs in Error and against the Defendant in Error; or in case such relief should be deemed improper, that said Supreme Court of the Territory of Hawaii be directed to remand the cause to the Circuit Court of the First Circuit for a new trial.

Dated, Honolulu, November 22, A. D. 1906

(Signed) KINNEY, McCLANAHAN & DERBY,
S. H. D.,
(Signed) BALLOU & MARX,
Attorneys for the Plaintiffs in Error.

Endorsed: No. 114. Reg. 1/88. Supreme Court Territory of Hawaii. Charles A. Brown *vs.* John D. Spreckels, *et al.* Assignment of Errors. Filed Nov. 22, 1906 at 3 P. M. Henry Smith, Clerk. Kinney, McClanahan & Derby 303-305 Judd Bldg. Honolulu. Attorneys for Plffs in Error. (Office No. ——.)

Endorsed on cover: File No. 20,668. Hawaii Territory supreme court. Term No. 281. John D. Spreckels, Adolph B. Spreckels, and C. August Spreckels, partners, doing business under the firm name of J. D. Spreckels Bros., *et al.*, plaintiffs in error, *vs.* Charles A. Brown. Filed April 18th, 1907. File No. 20,668.

Office Supreme Court, U. S.
FILED.
NOV 12 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 61.

JOHN D. SPRECKELS ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES A. BROWN.

AFFIDAVITS OF W. A. KINNEY AND JOHN A. SCOTT IN OPPOSITION TO MOTION TO DISMISS.

ROBBINS B. ANDERSON,
Attorney for Plaintiffs in Error.

(20,668.)

TERRITORY OF HAWAII:

OFFICE OF THE ATTORNEY GENERAL.

Whereas, under and by virtue of an act of the Congress of the United States of America, entitled "An act to provide a government for the Territory of Hawaii," approved on the 30th day of April, 1900, the appointment and removal of all notaries public within and for the Territory of Hawaii was vested solely in the Attorney General of said Territory:

Now, therefore, I, C. R. Hemenway, of Honolulu, island and county of Oahu, Territory of Hawaii, the duly appointed, commissioned, qualified, and acting Attorney General of said Territory, do hereby certify that R. W. Atkinson, Esq., of Honolulu, island and county of Oahu, Territory of Hawaii, was on the 15th day of April, A. D. 1907, duly appointed and commissioned as a notary public for the first judicial circuit of the Territory of Hawaii; that on the 8th day of September, A. D. 1908, his commission as a notary public remained in force and unrevoked, and that on said day he had full power and authority to act as a notary public in said first judicial circuit of said Territory.

In witness whereof I hereunto set my hand and have caused the seal of my office to be affixed this 29th day of October, A. D. 1908.

[Seal Attorney General, Territory of Hawaii.]

C. R. HEMENWAY,
Attorney General of Hawaii.

I, E. A. Mott-Smith, Secretary of the Territory of Hawaii, do hereby certify that C. R. Hemenway, whose signature is attached to the within certificate, is the duly appointed, commissioned, qualified, and acting Attorney General of the Territory of Hawaii; that the said signature is the sig-

nature of the said C. R. Hemenway, and that the seal attached is the seal of the office of the Attorney General of the Territory of Hawaii.

Done at Honolulu this 29th day of October, A. D. 1908.

E. A. MOTT-SMITH,
Secretary of Hawaii.

(20,668.)

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN D. SPRECKELS ET AL., *Plaintiffs in Error,*
vs.
CHARLES A. BROWN, *Defendant in Error.*

Affidavit of W. A. Kinney in Opposition to Motion to Dismiss.

HONOLULU, OAHU,
Territory of Hawaii, ss:

W. A. Kinney, being first duly sworn, on oath deposes and says that he is one of the attorneys for the plaintiffs in error, defendants below, in the above-entitled cause, and was actively concerned in the conduct of the defense in said cause in the courts of the Territory of Hawaii, and that he is and has been for many years well acquainted with the land sought to be recovered in said cause, said land being on the sea side of Front street, in the town of Hilo, Territory of Hawaii; that the premises in question sought to be recovered in this suit consist of accretions that extend so far out into the sea as to have become permanent land suitable for building purposes between the sea and Front street; that Front street in that vicinity constitutes a business section of the town of Hilo, and for many years last past the accretions in question have been occupied by buildings used for business purposes; that Front street, as the name implies, is a

public thoroughfare running parallel with the water front of the town of Hilo and being the street next to the sea; that across the street from the said land is the public post-office of said Hilo, and that some of the chief stores of Hilo are also opposite the land in question; that said accretions are suitable for the erection of permanent buildings, but that owing to the fact that the title of said land has been in doubt and under dispute the structures erected thereon have been of the most temporary character, and have all been put up by the tenants themselves.

That the valuation of said premises stated in the tax returns made by the said plaintiffs in error and in the tax assessments thereon has not for many years represented more than a small proportion of the actual value of said premises, owing to the fact that the title of said premises has been in serious doubt and under dispute and prolonged litigation, which not only made the interest of defendants therein of reduced and uncertain value, but forbade the erection of suitable structures on said premises; that the said doubt as to the title above referred to was in the first instance chiefly as to possible claims by the Territory of Hawaii, but that about nine (9) years ago another claim was set up by the defendant in error herein, Charles A. Brown, which latter claim has been in litigation ever since.

That affiant unhesitantly avers that the land covered by the complaint herein is and at the time this suit was brought was and ever since has been of the value of over five thousand dollars ($5,000); that over five thousand dollars ($5,000) has been spent in this litigation over said land; that affiant hereby offers and guarantees at any time on twenty-four hours' notice to procure a purchaser for over five thousand dollars ($5,000) for a good and perfect title to said land free from all claims, and further affiant sayeth not; that affiant has had for many years last past knowledge of the value of lands in the vicinity of said premises.

W. A. KINNEY.

Subscribed and sworn to before me this 8th day of September, A. D. 1908.

[Seal Robert Witlam Atkinson, Notary Public, Territory of Hawaii.]

R. W. ATKINSON,
Notary Public, First Judicial Circuit, Territory of Hawaii.

Service of a copy of the above affidavit is hereby admitted this 30th day of October, 1908.

CHAS. A. BROWN,
By His Att'y-in-fact, J. ALFRED MAGOON.

[Endorsed:] Supreme Court of the United States. John D. Spreckels *et al.*, plaintiffs in error, *vs.* Charles A. Brown, defendant in error. Affidavit of W. A. Kinney in opposition to motion to dismiss. Robbins B. Anderson, 303 Stangenwald bldg., Honolulu, attorney for plaintiffs in error.

TERRITORY OF HAWAII:

OFFICE OF THE ATTORNEY GENERAL.

Whereas, under and by virtue of an act of the Congress of the United States of America, entitled "An act to provide a government for the Territory of Hawaii," approved on the 30th day of April, 1900, the appointment and removal of all notaries public within and for the Territory of Hawaii was vested solely in the Attorney General of said Territory:

Now, therefore, I, C. R. Hemenway, of Honolulu, island and county of Oahu, Territory of Hawaii, the duly appointed, commissioned, qualified, and acting Attorney General of said Territory, do hereby certify that Walter C. Weedon, Esq., of Honolulu, island and county of Oahu, Territory of Hawaii, was on the 9th day of April, A. D. 1907, duly appointed and commissioned as a notary public for the first judicial circuit of the Territory of Hawaii; that on the 13th day of October, A. D. 1908, his commission as a notary public remained in force and unrevoked, and that on said day he had full power and authority to act as a notary public in said first judicial circuit of said Territory.

In witness whereof I hereunto set my hand and have caused the seal of my office to be affixed this 29th day of October, A. D. 1908.

[Seal Attorney General, Territory of Hawaii.]

C. R. HEMENWAY,
Attorney General of Hawaii.

I, E. A. Mott-Smith, Secretary of the Territory of Hawaii, do hereby certify that C. R. Hemenway, whose signature is attached to the within certificate, is the duly appointed, commissioned, qualified, and acting Attorney General of the Territory of Hawaii; that the said signature is the signature of the said C. R. Hemenway, and that the seal attached is

the seal of the office of the Attorney General of the Territory of Hawaii.

Done at Honolulu this 29th day of October, A. D. 1908.

E. A. MOTT-SMITH,
Secretary of Hawaii.

(20,668.)

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN D. SPRECKELS ET AL., *Plaintiffs in Error,*
vs.
CHARLES A. BROWN, *Defendant in Error.*

Affidavit of John A. Scott in Opposition to Motion to Dismiss.

HONOLULU, OAHU,
Territory of Hawaii, ss:

John A. Scott, being first duly sworn, on oath deposes and says:

That he is and has for many years last past been a resident of the town of Hilo, Territory of Hawaii; that he is the [president and]* manager of the Hilo Sugar Company and the president of the Hilo Electric Light Company; that he is and has been for many years last past well acquainted with the land sought to be recovered in the above-entitled cause, said land being on the sea side of Front street, in the said town of Hilo, Territory of Hawaii; that the premises in question sought to be recovered in this suit consist of accretions that extend so far out into the sea as to have become permanent land suitable for building purposes between the sea and Front street; that Front street in that vicinity constitutes a business section of the town of Hilo, and for many years last past the accretions in question have been occupied by buildings used for business purposes; that Front street, as the

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[*Words enclosed in brackets erased in copy.]

name implies, is a public thoroughfare running parallel with the water front of the town of Hilo, and being the street next to the sea, and that it is the principal business street of said town; that across the street from the said land is the public post-office of said Hilo, and that some of the chief stores of Hilo are also opposite the land in question; that said accretions are suitable for the erection of permanent buildings.

That affiant has had for many years last past knowledge of the value of lands in the vicinity of said premises; that affiant avers without hesitation that the land covered by the complaint herein is and at the time this suit was brought was and ever since has been of the value of over five thousand dollars ($5,000).

And further affiant sayeth not.

JOHN A. SCOTT.

Subscribed and sworn to before me this 13th day of October, A. D. 1908.

[Seal Walter C. Weedon, Notary Public, Territory of Hawaii.]

WALTER C. WEEDON,
Notary Public, First Judicial Circuit, Territory of Hawaii.

The words "president and," in 5th line, first page, erased before sworn and acknowledged.

W. C. W.

Service of a copy of the above affidavit is hereby admitted this 30th day of October, 1908.

CHAS. A. BROWN,
By His Att'y-in-fact, J. ALFRED MAGOON.

[Endorsed:] Supreme Court of the United States. John D. Spreckels *et al.*, plaintiffs in error, *vs.* Charles A. Brown, defendant in error. Affidavit of John A. Scott in opposition to motion to dismiss. Robbins B. Anderson, 303 Stangenwald bldg., Honolulu, attorney for plaintiffs in error.

(20,668)

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS and C. AUGUST SPRECKELS, Partners doing business under the firm name of J. D. SPRECKELS BROS., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA SEE, C. AHO, PETER MIGUEL TANG SING, and MRS. JOHN UTTERSTROM,

Plaintiffs-in-Error,
(Defendants Below),

vs.

CHARLES A. BROWN,

Defendant-in-Error,
(Plaintiff Below).

No. 61.

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFFS-IN-ERROR (DEFENDANTS BELOW) ON MOTION TO DISMISS WRIT OF ERROR.

MASON P. PROSSER,
ROBBINS B. ANDERSON,
Attorneys for Plaintiffs-in-Error.

(20,668)

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS and C. AUGUST SPRECKELS, Partners doing business under the firm name of J. D. SPRECKELS' BROS., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON,

Plaintiffs-in-Error,
(Defendants Below),

vs.

CHARLES A. BROWN,

Defendant-in-Error,
(Plaintiff Below).

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFFS-IN-ERROR (DEFENDANTS BELOW) ON MOTION TO DISMISS WRIT OF ERROR.

ARGUMENT.

Charles A. Brown, defendant-in-error in the above entitled cause, has filed a motion to dismiss the writ of error herein

based on three grounds. The plaintiffs-in-error oppose the motion and answer the three points made by defendant-in-error separately as follows:

I.

The first point made by defendant-in-error is:

> "First: That there is no final judgment of the Supreme Court of the Territory of Hawaii in said cause which can be reviewed by this Court on writ of error."

The simple and conclusive answer to this contention is that the final judgment of the Supreme Court of the Territory to which this writ of error is taken was entered by the Supreme Court of the Territory on a writ of error to the Circuit Court of the Territory and not on a bill of exceptions from said Circuit Court. The case of *Meheula vs. Pioneer Mill Co., Ltd.*, 17 Haw. 91, on which defendant-in-error bases his contention and from which he quotes copiously, dealt with the entry of a final judgment by the Territorial Supreme Court on overruling a bill of exceptions. The Supreme Court expressly limited its decision to such a case, carefully distinguishing between bills of exception and writs of error and referring to the Hawaiian Statute authorizing the entry of a final judgment by the Supreme Court on writs of error.

Meheula vs. Pioneer Mill Co., Ltd., 17 Haw. 91, 94.

This part of the decision in that case is included in the brief of defendant-in-error on this motion to dismiss, on page 6.

The Hawaiian Statute referred to, reads as follows, being included among the sections treating of writs of error:

> "JUDGMENT. The Supreme Court shall have power to enter such judgment in the case as in their opinion the facts and law warrant."

Revised Laws of Hawaii, Sec. 1883.

The Supreme Court in the present case exercised the power given them by the Statute and entered a "Final Judgment," which appears in the transcript, printed page 141.

II.

The second point made by defendant-in-error is:

> "Second: That nowhere in the pleadings nor in the decision in said cause is it disclosed that the value of the property in controversy is Five Thousand Dollars."

The answer to this contention is as simple and conclusive as our answer to the first contention of defendant-in-error. The transcript of record, printed page 145, contains an "Affidavit of Value" averring that the property in question, that is the land covered by the complaint, is of the value of over Five Thousand Dollars. The petition for writ of error filed with the affidavit of value states that the amount involved exceeded Five Thousand Dollars and the writ of error based on the petition, the affidavit of value and the record in the case, contains the same statement. It surely is not necessary to cite authorities in support of the practice of establishing the value of the property in controversy for purposes of appeal to this court by affidavits of value. Other evidence in the record and our additional affidavits of value are discussed under the third point hereinbelow.

III.

The third point made by defendant-in-error is:

> "That plaintiffs in error are estopped to claim that the value of the property in controversy is Five Thousand Dollars as set forth in affidavit of value of Walter M. Giffard (transcript 145), the agent of John D. Spreckels and Adolph B. Spreckels, as in said affidavit set forth, for the reason that the land in dispute has been returned for taxation by J. D. and A. B. Spreckels at One Thousand Five Hundred Dollars only, for the years 1906 and 1907, and assessed at that valuation as appears by affidavit of Nathan C. Willfong hereto attached and made a part hereof and to which reference is hereby made."

The defendant-in-error does not deny that the property in controversy is worth more than Five Thousand Dollars. He bases his contention entirely on the affidavit of the Tax Assessor, showing that the property has been returned for taxation by the agent of J. D. Spreckels' Bros., plaintiffs-in-error (the

other plaintiffs-in-error being merely tenants on the land) and assessed at the valuation of One Thousand Five Hundred Dollars. He claims that that tax return should be held conclusive against us as to the value of the property. We answer that the authorities are unanimous in holding that it is not so conclusive and that if it can be considered competent evidence at all on the question of value for the purposes of this case, it is entirely outweighed by the evidence that the value of the property exceeds Five Thousand Dollars.

In accordance with the established practice of this Court, we have filed in opposition to the motion to dismiss two affidavits of value by W. A. Kinney and John A. Scott.

Street vs. Ferry, 119 U. S. 385, 386.

The explanation of the low valuation stated in the taxation returns is plain and is set forth in the affidavit of W. A. Kinney as follows:

> "That the valuation of said premises stated in the tax returns made by the said plaintiffs-in-error and in the tax assessment thereon has not for many years represented more than a small proportion of the actual value of said premises, owing to the fact that the title of said premises has been in serious doubt and under dispute and prolonged litigation, which not only made the interest of defendants therein of reduced and uncertain value but forbade the erection of suitable structures on said premises; that the said doubt as to the title above referred to was in the first instance chiefly as to possible claims by the Territory of Hawaii, but that about nine (9) years ago another claim was set up by the defendants-in-error herein, Charles A. Brown, which latter claim has been in litigation ever since."

This sworn statement of W. A. Kinney is supported by the record, especially the affidavit of valuation of W. M. Giffard (transcript printed page 145). The complaint shows on its face that this suit was begun in 1899 (Transcript printed page 4).

No argument is needed to show that the tax payer and the tax assessor could and should in valuing the property take into account the fact that the title was under dispute and involved in prolonged and hard fought litigation and that there was serious doubt as to whether the taxing power itself, the Territory, did not own the land. It was really the claim of

J. D. Spreckels' Bros. to the property that was being valued and taxed.

But aside from the special explanation in this case, the valuation of the property for taxing purposes, even when contained in a sworn return, is not conclusive against the party making the return when the question of value arises in other proceedings. Many authorities hold that it is not competent evidence at all; none consider it conclusive or even of much weight.

> One often cited case declares that such a sworn statement "could have no weight in determining the value of the propery in question, incompetent in fact for that purpose, though perhaps admissible to tend to contradict his testimony in chief (i. e. testimony of owner of property)."
>
> *Virginia & Truckee R. R. Co. v. Henry,* 8 Nev. 165, 174.

In proceedings to condemn a right-of-way the Texas Court held "Evidence showing at what valuation appellees had rendered their land for taxation was immaterial (to prove value) and was properly excluded from the consideration of the jury."

> *Railway v. Kell,* 16 S. W. 936 (Texas);
> *Accord, Cincinnti, etc., R. R. Co. v. McDougall,* 108 Ind. 179.

Another court has hdd that such a return is admissible in evidence but is "of coure not conclusive."

> *Vernon Shell-Road Co. v. Mayor,* 95 Ga. 387.

See also,

> *10 Enc. of Law,* 1154.
> *Mills on Eminent Domain,* 2nd Ed., Sec. 172.

On the question of the weight of the evidence as to value, we submit that the affidvit as to the taxation return, the only evidence offered by defendant-in-error, is entirely outweighed by our affidavits plus the evidence to be gathered from the record. Our affidavits need not be quoted here, but are worthy of careful consideration. They are not merely unfounded guesses as to the value, but contain many statements of undisputed facts as to the location and character of the property from which this court can itself judge of the value. We call attention especially to the positive character of the averments and to the standing offer of W. A. Kinney to procure a pur-

chaser for the land at a price to exceed Five Thousand Dollars at any time on twenty-four hours notice.

The history of the litigation lasting already for nine years and the sums of money expended therein indicate the high value of the property. The trial judge (Transcript printed page 59) states that the last trial before him "had consumed practically four weeks, involving valuable property, and, as counsel has stated, a great deal of money had been expended."

The costs of defendant-in-error were taxed by the Supreme Court at One Thousand Three Hundred and Thirty-eight Dollars (Transcript printed page 142). Plaintiffs-in-error have spent over Twelve Hundred Dollars for costs and witness fees alone in a part of the litigation (Transcript printed page 52).

The defendant-in-error has commenced an action for mesne profits against John D. Spreckels and Adolph B. Spreckels, plaintiffs-in-error, claiming as mesne profits the sum of Twenty-five Thousand Dollars for the occupation of the land in question in this suit and certain other smaller pieces of land not so valuable as the land in question (Transcript printed page 146).

The pleadings on this writ of error also repeatedly state or indicate that the value of the property involved exceeds the sum of Five Thousand Dollars. That statement is contained in the petition for writ of error and also in the writ of error itself, which was allowed by the Chief Justice of the Territorial Supreme Court, being based partly on the petition and the affidavit of value of W. M. Giffard. The supersedeas bond was fixed at the sum of Ten Thousand Dollars.

In conclusion we submit that the defendant-in-error should have made his fight on this question of value before the Territorial Supreme Court, which was in a much better position to receive evidence and determine this question, rather than waiting sixteen months after the issuance of the writ of error and then making a motion to dismiss in this Court. Such practice should not be encouraged.

Respectfully submitted,

Wm. F. Prosser

Robbins B. Anderson

Attorneys for Plaintiffs-in-Error.

Honolulu, October 30, A. D. 1908.

(20,668)

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS and C. AUGUST SPRECKELS, Partners doing business under the firm name of J. D. SPRECKELS' BROS., and A. G. SERRAO, D. LYCURGUS, S. C. GUERRERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON,

Plaintiffs-in-Error,
(Defendants Below),

vs.

CHARLES A. BROWN,

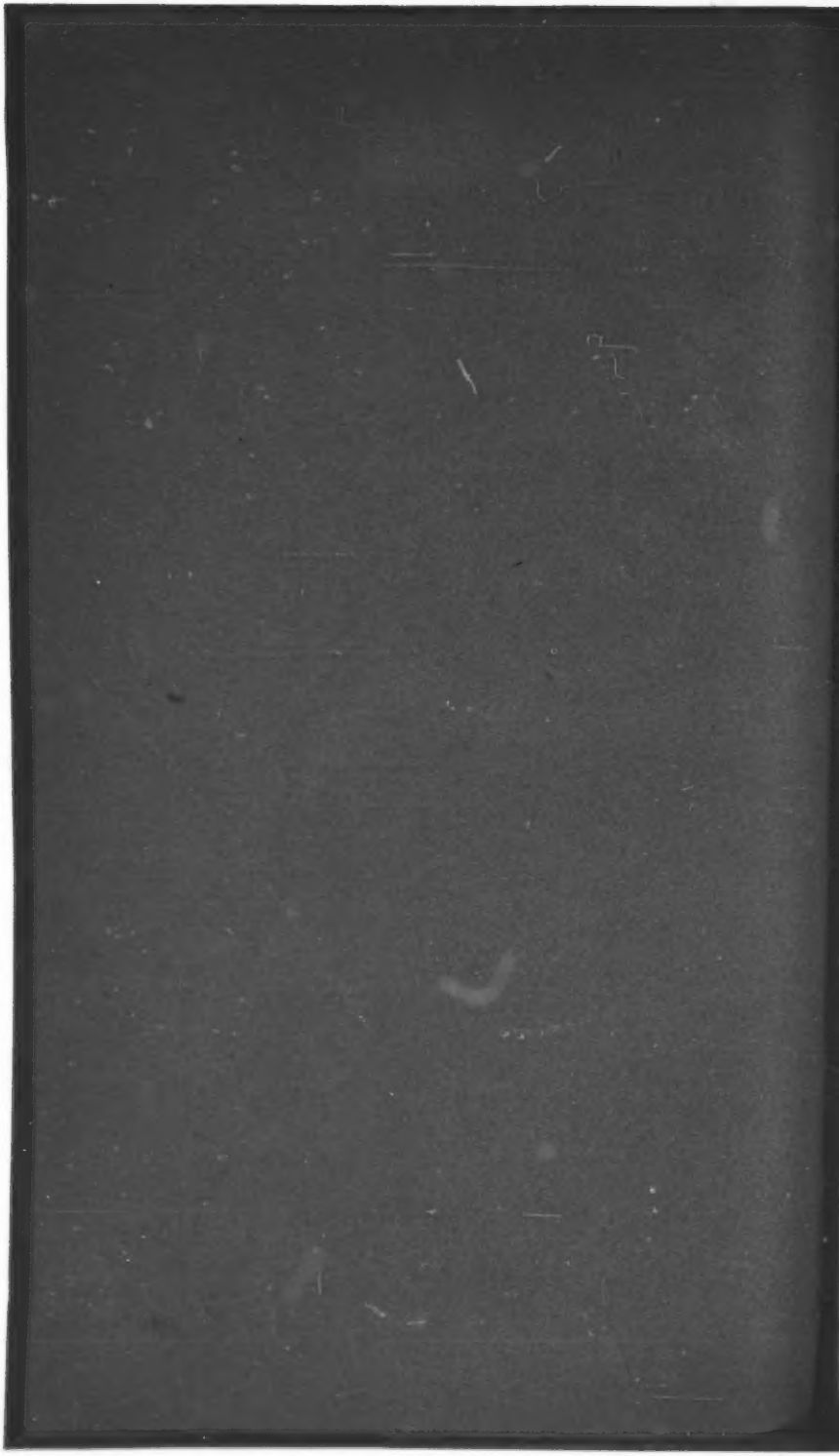
Defendant-in-Error,
(Plaintiff Below).

No. 61.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR PLAINTIFFS-IN-ERROR (DEFENDANTS BELOW.)

MASON F. PROSSER,
ROBBINS B. ANDERSON,
Attorneys for Plaintiffs-in-Error.



(20,668)

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS and C. AUGUST SPRECKELS, Partners doing business under the firm name of J. D. SPRECKELS' BROS., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, W. K. AKANA, WING SING, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTRON,

Plaintiffs-in-Error,
(Defendants Below),

vs.

CHARLES A. BROWN,

Defendant-in-Error,
(Plaintiff Below).

In Error to the Supreme Court of the Territory of Hawaii.

BRIEF FOR PLAINTIFFS-IN-ERROR (DEFENDANTS BELOW.)

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Supreme Court of the Territory of Hawaii affirming a judgment of the Circuit Court of the said Territory in favor of the plaintiff, the present

defendant-in-error, in an action of ejectment. The plaintiff obtained his judgment on the fifth jury trial after three disagreements of juries and one non-suit, which latter was set aside by the Supreme Court of the Territory. The defendants below, now plaintiffs-in-error, seek a reversal of the judgment of the Supreme Court. The transcript of evidence has been omitted from the transcript on file in this Court to avoid cumbering the record. The facts are set forth sufficiently to enable this Court to pass upon our exceptions in the two decisions of the Territorial Supreme Court found beginning on printed pages 108 and 116 of the printed transcript, the main statement being in the earlier decision as is stated in the later decision on printed page 119. There are also numerous exhibits attached.

The Court will notice that there is an obvious omission on printed page 109 in the middle of the tenth line of the earlier opinion of the Supreme Court of Hawaii between the words "Waianuenue" and "and" which can be supplied from the official edition of the Hawaiian Reports, volume 14, page 401, in which the paragraph in question reads as follows:

> "Front Street runs nearly parallel with and not far from the sea shore at Hilo. Waianuenue and King streets run at right angles to Front street, one block apart, King street being on the Southeasterly or Puna side of Waianuenue street. One title covers the land above Front street between Waianuenue and King streets; the other covers land above Front street, but on the other or Puna side of King street. The question in these actions is whether these titles cover the land, mostly accretions, below Front street, that is, between Front street and the sea, in front of the pieces on the upper side of that street."

The facts as they appear in the record are as follows:

This is an action of ejectment for two pieces of land each composed of accretions on the water front at Hilo, Island of Hawaii, Territory of Hawaii. In Hilo Front street runs nearly parallel with and not far from the sea front. Waianuenue and King streets run at right angles to Front street one block apart, King street being on the southeasterly or Puna side of Waianuenue street. Of the two distinct pieces of land in question the first is described in Schedule "A" of the complaint and is a portion of the accretions lying in front of

certain land situated above Front street between King and Waianuenue streets referred to herein as the Bates land. The other piece of land involved is described in Schedule "B" of the complaint and is a portion of the accretions in front of certain land lying above Front street on the Puna side of King street referred to herein as the Kalaeloa land. The two chains of title covering, according to plaintiff's claim, the two pieces of land in dispute run separately for a time and later unite. One title covers the land above Front street between Waianuenue and King streets, that is the Bates land. The other covers the land above Front street on the other or Puna side of King street, that is the Kalaeloa land. The question in this action is whether these titles under which plaintiff claims cover the accretions below Front street, that is, between Front street and the sea in front of the aforesaid pieces on the upper side of that street.

The chain of title to the Bates land begins with a deed from King Kamehameha III to Elizabeth G. I. Bates, dated September 19, 1853, plaintiff's Exhibit "A", and a deed from Elizabeth G. I. Bates and Asher B. Bates to Benjamin Pitman, dated July 3rd, 1858, plaintiff's Exhibit "B".

The chain of the title to the Kalaeloa land begins with a deed, a Royal Patent, from Kamehameha III to Kalaeloa, dated July 7, 1853, written in Hawaiian, which, with the translation thereof, is the plaintiff's Exhibit "E" (based on a Land Commission Award, plaintiff's Exhibit "D"), and a deed from Kalaeloa and his wife to Benjamin Pitman, not dated, but acknowledged August 28 and September 18, 1854.

The plaintiff claims that these two chains of title having thus become united in Pitman there was later a separation between the land above and that below Front street, and that Pitman having conveyed away the former land, the title as to the two pieces of land in question being the accretions below Front street continued as follows: devise by Benjamin Pitman to Martha B. Pitman, his wife, by Will dated March 4, 1880, probated March 27, 1888, see plaintiff's Exhibit "F"; and deed of release from Martha B. Pitman to the plaintiff, Charles A. Brown, dated August 2, 1899, plaintiff's Exhibit "C".

The title to the land above Front street came from Pitman to the defendants by deeds which need not be set forth. The plaintiff does not dispute the defendants' title to the parts above Front street; the action is for the parts below the street, that is, the accretions.

The defendants do not contest the validity of the above

named documents of title offered in evidence as plaintiff's Exhibits, with the exception of the release from Martha B. Pitman to the plaintiff. The dispute is as to how much those deeds cover, that is, whether they cover only the parts above Front street or the accretions also, and as to the validity of the said deed of release.

The jury failed to follow the rule of apportionment of accretions laid down by the trial judge in his instructions and awarded to the plaintiff all he claimed in his bill of complaint, including a portion which would have gone to a third party, namely the Territory of Hawaii, under the rule laid down by the Court.

The defendants in addition to claiming that the plaintiff failed to show title in himself, also set up a claim of adverse possession. In the absence of the transcript of evidence, however, they now under this head raise only one question as to an instruction given to the jury at the request of the plaintiff.

At the close of the evidence the trial judge stated in overruling the plaintiff's motion for a directed verdict, that he was in favor of the plaintiff, but did not want to grant the motion as there was still some doubt in his mind and that if the jury should render a verdict for the defendant and a motion to set aside the verdict was made, he might do so. This statement of the Judge, although made in the absence of the jury, was published in a newspaper of general circulation in Honolulu that afternoon and again in a newspaper the following morning, with an interview by the Judge authenticating the statement, and was read by several of the jurors before the submission of the case to the jury the following morning, and the statement in the morning paper, together with the interview by the Judge, was read aloud in the jury room by one of the jurors during the deliberation of the jury. One of the counsel for defendants, though knowing that the said statement had been published in the afternoon newspaper, had waived the customary admonition not to read the papers which the Judge was proceeding to give the jurors before separating on that last afternoon of the trial.

The defendants made a motion for a new trial based on this misconduct of the jury and filed in support thereof certain affidavits as to the facts, including the reading of the statement of the Judge in the papers aloud in the jury room. The plaintiff filed counter affidavits of the jurors stating that they had not been influenced by the statement of the Judge as read in the papers. The Judge admitted these counter affidavits and denied the motion for a new trial.

SPECIFICATION OF ERRORS.

Plaintiffs-in-error rely on the following errors in the decision and judgment of the Supreme Court of the Territory of Hawaii:

1. In holding that the deed of release from Martha B. Pitman to Charles A. Brown, plaintiff below, was valid and carried the grantor's title, if any, to the grantee. (See Assignment of Errors 1, 2, 6, 10, 13, 14, 16, 18 and 19).

2. In holding that the following instruction given by the Circuit Judge was correct:

> "I instruct you that the words 'also the sea beach in front of the same down to low water mark' used in the deed of Kamehameha III to Elizabeth J. I. Bates covers the land described in Exhibit 'A'." (Plaintiff's instruction No. 2.)

(See Assignment of Errors, 4, 6, 11 and 22.)

3. In holding that the Land Commission Award and the Royal Patent from Kamehameha III to Kalaeloa based thereon carried the land to low water mark. (See Assignment of Errors 6, 8 and 20.)

4. In holding that the following instruction given by the Circuit Judge was correct:

> "I instruct you that the words 'with the right of extension to low water mark' used in the deed from Kalaeloa to Pitman, together with the other particular descriptions contained in said deed, covers the land described in Schedule B." (Plaintiff's instruction No. 3.)

(See Assignment of Errors 5, 6, 8, 12, 20 and 21.)

5. In holding that the accretions sued for were correctly apportioned by the jury in the Circuit Court of the First Circuit in spite of instructions to the contrary by the trial judge. (See Assignment of Errors 14, 23 and 24.)

6. In holding that the following instruction given by the Circuit Judge was correct:

> "I charge you that the defendants in this case rely for one defense upon adverse possession. The burden of proving this defense is upon defendants; unless you are satisfied by a preponderance of the evidence that

the defendants have *clearly* proven adverse possession as defined in these instructions, you will find against defendants upon that point." (Plaintiff's instruction No. 6.)

(See Assignment of Errors 7.)

7. In holding that the remarks of the trial judge on the argument of motion for a directed verdict, that if the jury should render a verdict for the defendants and a motion to set aside the verdict should be made, he might do so, together with the publication of accounts of said remarks in the newspapers and the reading of said newspapers by the jury in the jury room during their final deliberation did not constitute good ground for a new trial. (See Assignment of Errors 17 and 30.)

8. In holding that the Circuit Court rightfully admitted in evidence on motion for new trial the affidavits of H. P. Benson, James E. Jaeger, Thomas W. Chase, P. Lishman, Wm. Buckle, H. W. Doane, G. H. Cowan, G. G. Fuller, Chas. H. Pfeiffer, A. M. Mellis, John T. Mitchell and F. C. Atherton, jurors in said cause, filed as reply affidavits by plaintiff. (See Assignment of Errors 15.)

ARGUMENT.

I.

THE DEED OF RELEASE COVERING BOTH THE TWO PIECES OF LAND IN QUESTION FROM MARTHA B. PITMAN TO CHARLES A. BROWN, THE PLAINTIFF, CONVEYED NO TITLE TO THE LATTER.

(See Assignment of Errors 1, 2, 6, 10, 13, 14, 16, 18 and 19.)

The facts in conection with this deed of release to plaintiff, now defendant-in-error, are (transcript printed pages 119 and 120) that Pitman in 1861 conveyed the parts of both lands above Front street to Thomas Spencer. Under the contention of plaintiff this deed from Pitman to Spencer did not carry the premises in dispute. Pitman then left the Hawaiian Islands never to return and died in Boston in 1888, leaving the parts below Front street, if any title to them still remained in him, to his widow as part of the residue of the estate without making any reference to them even impliedly in his Will. In

1899 his widow, not being in possession, made the deed of release in question to the plaintiff, who also was not in possession and was a stranger to the title. The operative words of the deed are "remise, release and forever quit claim unto said Charles A. Brown and his heirs and assigns forever, all and singular my right, title and interest in and to the land and premises," etc. This form is used twice in the deed and the habendum refers to "the above released lands, premises and property." The words "give, sell, assign, transfer and set over" are used in the instrument but only with reference to back rents, issues and profits. The consideration is stated in the deed to be $5000. The deed releases to the plaintiff not only the lands in question, but also all the grantor's right, title and interest in and to all of the Bates and Kalaeloa lands and all other lands, premises, fisheries, etc., belonging to the grantor's husband at the time of his death and also all of the grantor's right to back rents, issues and profits from any or all of said lands.

Our contention under this head is based on the form of the deed, which is merely a release. We submit that a release at common law to one out of possession is void and that the common law must be followed in Hawaii, except as modified by Hawaiian statute, judicial precedent or usage.

It is well settled common law that a release to a person not in possession of the whole or some part of the premises conveys no title. This law has been changed by statute in many States, but there is no statute in Hawaii to modify the common law upon this point.

> "Releases; which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are 'remised, released, and forever quit-claimed.' And these releases may enure either: 1. By way of enlarging an estate or enlarger 1' estate: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But in this case the relessee must be in possession of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee."

2 Blackstone's Commentaries, Chap. 20, 324.

In the edition of Blackstone's Commentaries by William G. Hammond, Dean of St. Louis Law School, the following note is appended to this paragraph:

"(60) Such release is void for want of possession in the relessee, page 324.

"This has been criticised, by Mr. Sweet and others, as not accurately expressed. The examples given are those of other releases, such as those which pass an estate, pass the right, etc., where Blackstone says nothing of possession; or by saying that tenant at will may take a release, as if Blackstone had required seisin and not possession.

"It is conceived that this rule is still in force, although many of our American books speak of land as passing by quit claims (which is only another name for release) to one who had no interest or possession before. The explanation is that the term 'quit-claim deed' is very commonly used, even by lawyers and judges, for a simple deed of conveyance without covenants, as opposed to a warranty deed, or to a deed with covenants against grantor. Such deeds pass the land and its legal possession by virtue of the granting words in them: they do not merely 'remise, release, and quit claim,' which presupposes possession in the grantee. If a deed in the latter form be held to pass the title, it can only be by virtue of that loose construction which disregards all words and rules, in order to carry out the understood intention of the parties. Such 'equitable constructions' are denials of right, not to the parties themselves, but to the countless unborn litigants whose rights will be taken away or squandered in useless litigation by reason of the precedents thus created. In some cases we find judges already applying to simple deeds of conveyance rules of law that belong only to releases proper, because of this misuse of the term 'quit claim.' (See cases collected in Boone on Real Property, Sec. 324, notes 7 and 8.)"

"Both the lease and release were known to and in use under the common law. But for the latter to become operative, it had to be made to one having an estate in or possession of the land."

3 Washburn Real Prop. (6th Ed.), Sec. 2238.

"While a deed of simple release, made to one who has neither an estate in, or possession of, land, would be merely void, a form of deed of the nature of a release, *containing words of grant* as well as release, commonly known as a quit claim deed, has long been in use in this country," etc.

Ibid. Sec. 2239.

"At common law a deed of release was operative only when made to a party in actual possession of the land. It was intended to enable a person who had bought lands and entered into possession in good faith, to buy in the reversion or to protect himself against outstanding titles. If another party was in possession, the deed was inoperative and void."

Runyon v. Smith, 18 Fed. 579, 581.

"But a mere release or quit claim, unless the releasee is in possession, is void."

Bennett v. Irwin, 3 Johns R. (N. Y.) 362, 366.

"No man having a title to land, can pass the same by release, when neither of the parties to the release have any possession, actual or legal, in the land released."

Porter v. Perkins, 5 Mass. 233, 236.

See also,

Warren v. Childs, 11 Mass. 222;

Mayo v. Libby, 12 Mass. 339, 343;

Miller v. Emans, 19 N. Y., 384, 387, 393;

Baker v. Woodward, 12 Or. 3, 11;

*4 Greenleaf's Cruise on Real Property,** 78.

The common law of England except as modified by Hawaiian judicial precedent or usage is the common law of this Territory.

"The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States or by the laws of the Territory of Hawaii, or fixed by

4 Greenleaf's Cruise on Real Property, 78.

Hawaiian judicial precedent, or established by Hawaiian usage,....."

Revised Laws of Hawaii, Sec. 1.

The common law has not been so modified on this point in Hawaii. As we have said there is no statute changing it and there is no decision on the point in our reports. We submit that the Territorial Supreme Court in its decision in the present case has failed to distinguish between the rule for which we contend, to-wit, that a deed of *release to* a stranger *out of possession* is void and the separate and distinct rule founded on entirely different grounds that *any conveyance by* a disseisee to a stranger is void. Our Supreme Court has previously held that the latter rule is not in force in the Territory because the foundations of the rule, such as the necessity for livery of seisin, unless the grantee is already in possession, and the old laws against champerty and maintenance do not obtain here. It has never been decided, however, in Hawaii that a release by a disseisee to a stranger out of possession is valid although there is a dictum to that effect in *Ninia vs. Wilder,* 12 Haw. 104, 118, referred to in the decision of the Supreme Court of the Territory in the present case (transcript printed page 120).

II.

THE COURT ERRED IN INSTRUCTING THE JURY THAT THE LAND DESCRIBED IN EXHIBIT "A" (BATES LAND) WAS CONVEYED BY THE WORDS "SEA BEACH." (See Assignment of Errors 4, 6, 11 and 22.)

The Circuit Court gave the following instructions to the jury on this point:

> "I instruct you that the words 'also the sea beach in front of the same down to low water mark' used in the deed of Kamehameha III to Elizabeth J. I. Bates covers the land described in Exhibit 'A'."
>
> (Plaintiff's instruction No. 2.)
>
> "I instruct you that plaintiff has made out a complete paper title to the two pieces of land described in Schedules 'A' and 'B' attached to his complaint."
>
> (Plaintiff's instruction No. 5.)

These instructions were held to be correct by the Supreme Court.

The facts on which the dispute as to the Bates land arises are as follows: The first deed in the chain of title to the Bates land, namely the deed from King Kamehameha III to Mrs. Bates conveyed (transcript printed pages 110 and 122) the land above Front street by courses and distances and, except the front line, by monuments and then adds the following: "And also the sea beach in front of the same down to low water mark." The front line of the portion of the land described by metes and bounds did not coincide with the present upper side of Front street, but ran diagonally up from King street to Waianuenue street, striking the latter street about a chain above the present corner of that street and Front street. A short distance below this line there was an earth bank against which the sea washed at the date of the deed, this bank in places being above the present lower side of Front street. This bank was then the line of ordinary high tide. There was a strip of considerable size, something over one hundred and ninety feet long and from one hundred to two hundred feet wide between high water mark and the upper piece of land described by metes and bounds in the deed.

The high water mark is now, owing to accretions, some distance out from where the bank was formerly.

The deed from Bates to Pitman follows practically the identical language of the deed from Kamehameha III to Bates.

As all the Bates land at present in question below the line of the old earth bank is admittedly accretions, it is obvious that the title to these accretions will follow the ownership of the strip of land between the front line of the surveyed portion of the Bates property and the earth bank, which was the line of high water mark.

When this case was before the Territorial Supreme Court on the former appeal from a non-suit granted by a Circuit Judge, we contended, as we contend now, that the words "sea beach" had a fixed legal meaning, namely the shore between high and low water marks, and that therefore the deed from the King to Bates covered, besides the land above Front street, only the beach strictly speaking, and that all the accretions belonged to the owner of the aforesaid strip of land immediately above high water mark, which was not conveyed. In support of that contention we cite the following authorities, showing the well fixed, invariable meaning that has been attached to the word "beach."

In an English case in defining the meaning of the word "shore" the following language was used, the Court taking it for granted that there could be no question as to the legal meaning to be attached to the term:

> "The property is of a peculiar description, namely, land between high and low water mark."

Scratton v. Brown, 4 B. & C. 485, 495.

A local statute prohibited cattle from running at large on Winter Harbor Beach and authorized the impounding of cattle that should trespass on these prohibited lands. The Court in the consideration of the place where the cattle were actually caught, as to whether it was the beach or not, used the following language:

> "We do not see how the *locus in quo* can be considered as a part of the beach. It was above high water mark and within the seawall. By a beach is to be understood the shore or strand; and it has been decided that the sea shore is the space between high and low water mark."

Cutts vs. Hussey, 15 Me., 237, 241.

> " 'Beach' is the shore or strand. It means the land lying between the lines of high and low water, over which the tide ebbs and flows. This is the fixed and definite meaning of the word 'beach' when used in reference to places anywhere in the vicinity of the sea or arms of the sea."

3 Enc. of Law, 2nd Ed., 901.

See also,

Gould on Waters, p. 61, 64;

Littlefield vs. Littlefield, 28 Me., 180, 184, 185, 186;

Doane vs. Willcut, 71 Mass., 328, 335;

Niles vs. Patch, 79 Mass., 254, 257;

Hodge vs. Boothby, 48 Me., 68, 70;

East Hampton vs. Kirk, 6 Hun 257, 9;

Coburn vs. San Mateo County, 75 Fed., 520, 531.

The Supreme Court, however, on this former appeal, although admitting that ordinarily the words "sea beach" would mean only the land between high and low water marks, decided against our contention holding that there was in this case a latent ambiguity which could be determined by evidence *aliunde*.

> "But when an attempt is made to apply the description to the land, a latent ambiguity appears. There is found a strip between high water mark and the lower particularly described boundary. This especially in connection with the phrases 'in front of the same' and 'down to low water mark' gives rise to the question whether the word 'beach' was not used in its broader sense. This question arising by evidence *aliunde* may be determined by evidence *aliunde*."

(Transcript printed page 115.)

We submit that the Court erred in its ruling as to what constitutes a "latent ambiguity."

The entire description in the deed is as follows:

> "Commencing at North corner of the Court House yard on Waianuenue street and running along the fence in front of said yard South 43, 30 E. 3.11 chains to the black wall by Merchant street, thence running down this wall and street N. 51, 36 East 8.35 chains to a large stone, thence across to Waianuenue street N. 43, 30 West 3.50 chains, thence up this street S. 49 W. 8.33 to place of commencement. And also the sea beach in front of the same down to low water mark and being the same premises heretofore conveyed to Elizabeth G. I. Bates by deed which has been mislaid or lost."

There is no difficulty whatever in applying the surveyed portion of the description in the deed to the ground. The courses and distances correspond with the monuments, the survey closes exactly and in all respects is full and accurate. The additional words "And also the sea beach in front of the same down to low water mark," coupled with the facts that the second and fourth lines of the survey do not purport to reach the sea, the beach, or high water mark, the fact that the lower line of the surveyed portion does not purport to run "along the

sea," "along high water mark" or any other monument which would naturally suggest itself, and the further fact that the space intervening between this line and high water mark was actually in use at the time as a public highway, all seems to us to point conclusively to a deliberate intention to leave in the possession of the king or crown the strip in question. That this strip should be found exactly where it was to be expected, does not constitute a "latent ambiguity" within any meaning of that term with which we are familiar.

We claim that as a matter of law the deed does not cover the strip between the lower surveyed boundary and high water mark. If this contention is sustained it is conclusive against the right of the plaintiff, who must recover on the strength of his own title; although the effect would be to leave the title in this strip, together with the accretions which go with it, in the Territory of Hawaii or the United States, as successor in title to the crown.

If, however, the deed does not leave out the strip in question as a matter of law, it becomes, upon this former decision of the Supreme Court of the Territory, a question of fact to be determined by evidence *aliunde.*

In accordance with this former ruling of the Supreme Court both parties on the new trial before the Circuit Court introduced evidence as to what "sea beach" was intended to convey, but at the close of the case the trial judge put his own construction upon "sea beach", taking it away from the jury entirely under the instructions quoted above. If our former contention as to the meaning of this term is correct at least the meaning was a proper subject for evidence and evidence was introduced by both sides, and we submit that the question should not have been taken from the jury by these two instructions, which practically held as a matter of law that the land between the surveyed part of the Bates piece and high water mark, as well as that between high and low water marks, passed under the term "sea beach."

We may add that an examination of the deed from Kamehameha III to Bates makes it obvious that two distinct pieces of property were granted thereby, one being "the sea beach." The punctuation of the deed embracing the second piece, that is "And also the sea beach in front of the same down to low water mark" in a separate sentence, and the use of the phrase "and also" indicate clearly that there were two separate parcels conveyed by this deed. Whether they joined one another or were separated by intervening land the deed does not tell

us. It merely says that there were two pieces of land which it designed to convey to the grantee.

It is true that under our contention one of the plaintiff's two pieces of land, to-wit, "the sea beach", would be gradually moving out further from the other. It is perfectly possible to have a moveable freehold of this particular character as is established by an English case squarely in point.

Scratton vs. Brown, 4 B. & C. 485.

III.

THE LAND COMMISSION AWARD AND ROYAL PATENT TO KALAELOA DID NOT EXTEND BELOW THE UPPER SIDE OF FRONT STREET.

(See Assignment of Errors 6, 8 and 20.)

The facts material to the dispute as to the extent of the Kalaeloa grant are as follows: The description of the Kalaeloa piece is the same in both the Land Commission Award and the Royal Patent from Kamehameha III to Kalaeloa based thereon. It is in Hawaiian and the certified translation annexed to the Patent reads:

> "Beginning at the West corner of this, adjoining the edge of the street (King street) along the edge of the sea adjoining the land of Anaana and stone wall and Hanamaikai, and running."

Then follow courses and distances and area. Thus there are two descriptions. One is by monuments, that is, King street on one side, the sea in front, the land of Anaana and stone wall on the other side, and the land of Hanamaikai in the rear. The other description is by courses and distances and by area. There is also a diagram on both Award and Patent representing the land by heavy lines, leaving a space between the front line and the sea, enclosed at the ends with dotted lines, extensions of the two side lines, and with the word "beach" in this space. The names of the other monuments also appear on the diagram in their proper places. The description by courses and distances and area and by the continuous bounding lines on the diagram brings the line down only to the upper side of Front street which was above high water mark, leaving a strip still remaining in the King, as was the case with the Bates land.

We contend that the Kalaeloa grant did not extend below the upper side of Front street, which was above high water mark, leaving a strip still remaining in the King, to whom and to whose successors in ownership of this strip the accretions in question would necessarily belong. Kalaeloa received simply the piece of land lying on the upper side of Front street. He obtained no water front at all and consequently no right to accretions.

We believe that in this case courses plus distances plus area plus the map should govern the more or less ambiguous and general clause "along the edge of the sea." While it is true as a general rule that natural boundaries will control in a conflict between themselves and courses and areas, yet that is far from an inflexible rule. The only reason given for the rule is that natural monuments are less liable to mistake than courses and distances and whenever in any particular case the reason for the rule ceases the rule is not applied.

In a case in the United States Supreme Court the deed contained two calls for monuments, one a range of mountains and the other a fence. These monuments were inconsistent with the courses and distances as given in the other description and the Court rejected the two in spite of the argument that calls for monuments should prevail over courses and distances particularly when the monuments are natural ones. The Court said:

> "It is true that as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances, but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call and thus defeat the conveyance."
>
> "There is a call for this fence as a boundary during the running of seven courses; but it is plainly a false call after the sixth course has been run, for the seventh course departs at nearly right angles from the line of the fence, and if this course be rejected and the call for the fence retained, none of the other calls in the deed can be complied with and the instrument is wholly unintelligible. On the contrary, if this course be accepted as the true description, and the call for

the fence be discarded at the termination of the sixth course, there is no difficulty in harmonizing the other parts of the deed, with the exception of the Northern boundary, and the difficulty there, we think, can be easily removed. It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence and reject the call for the course and distance. The reason why monuments as a general thing, in the determination of boundaries, control courses and distances, is that they are less liable to mistakes, but the rule ceases with the reason for it."

White vs. Luning, 93 U. S., 514, 524, 525.

The deed in question in a Massachusetts case conveyed a piece of land describing it exactly by metes and bounds which closed and left a perfectly well defined piece. The deed was particularly similar to the present one, in that it first gave a general description of the land in question and then described by metes and bounds. There was a conflict between the description and the metes and bounds in the particular description and the Court rejected the general description as being in conflict with the particular description by metes and bounds, using the following language in speaking of the rule that monuments would prevail over distances and courses:

"It (this general rule) is not, however, inflexible, but like other rules of law it must sometimes yield to exceptions. These are to be made in cases in which the reason of the rule or principle fails. *Cessante ratione legis, cessat ipse lex.* On this ground we are of opinion that the rule referred to is not applicable to this case.

"The only reason given, or which can be given, why monuments are to control the courses and distances in a deed, is that the former are less liable to mistakes. If then it appears that no mistake can reasonably be suposed to have been made in this case no reason remains for the application of the rule. Now it seems to me impossible that such a mistake in the measure, as is supposed by the defendant, could have been made. The first line, according to the deed is to extend only 1 foot and 3 inches. It was measured without doubt by a common rule or scale. Who, then can believe that the line actually measured was in fact

3 feet 6 inches; and that in measuring a line so very short a mistake was made of 2 feet and 3 inches. Such a supposition, if not altogether impossible, is at least, in the highest degree improbable."

Davis vs. Rainsford, 17 Mass., *207, 210.

"When there is anything in the description which shows that the courses and distances are right in themselves, they will prevail because the primary object in all cases is to carry out the intention of the parties; as when it is apparent from the face of the deed that the intention was to convey a specific quantity of land, if the courses and distances given would include such quantity and the description by monuments embrace more or less, the former should be followed."

Higinbotham vs. Stoddard, 72 N. Y., 94, 99.

In the case at bar, apart from the reference to the edge of the sea, the courses and distances are entirely correct and consistent. They close and give a well defined tract of land including the precise area of land mentioned in the deed. They are all so short as to be susceptible of entire accuracy. On the other hand, following the natural monuments, as desired by the defendant-in-error, means that the first distance must be ignored as being incorrect; that the second and third distances and courses are rendered of doubtful value; that the third course must be rejected as being incorrect and that the acreage must be entirely ignored. Furthermore, there is the map itself annexed to the Patent. This marks out in solid lines the exact boundaries contended for by us. The boundaries answer the courses and distances as given, embrace the acreage described in the Patent and satisfy the calls for natural monuments. Running below this are dotted lines down to the sea. The fact that these lines are dotted and not solid is in itself an indication that they were not regarded as a portion of the land covered by the Patent.

There is no necessary virtue in following one part of the description in a deed rather than another. If the different parts of the description are inconsistent the question is, which is the correct part, which will carry out the intention of the parties? We submit that it is vastly more probable that there should be a mistake in the one natural boundary, the sea, rather than in all the accurately and carefully worked out

courses and distances and area and map. But, and this point we wish to emphasize, it is not necessary to hold that the call for the natural boundary is wrong. The call "along the edge of the sea" is a phrase which could easily be used loosely, particularly in an undeveloped and inexact language like the Hawaiian. The decision of the Hawaiian Supreme Court (transcript printed page 112) shows that different phrases were used in this deed in describing the natural boundaries, which indicates that the parties were using language rather loosely or that they had in mind a distinction between the stone wall and the street which were in actual contact with the land, and the sea which might be simply a nearby natural object which they could use in order to complete the second description, that is the description by natural monuments.

If there still could be said to be any reasonable doubt as to what interpretation should be put upon the instrument in question, it would seem that the present is a proper case for the application of the well recognized rule that in construing a deed from the sovereign power to an individual the deed will be construed in favor of the government, since the Court will not presume to abridge the public domain or derogate from the sovereign power to any greater extent than the language of the instrument submitted to it for interpretation clearly and obviously requires it to do. This rule applies with particular force where the contention is that the deed covers lands that are usually held in trust by the sovereign for the benefit of the people.

IV.

THE DEED FROM KALAELOA TO PITMAN DID NOT CARRY THE PART OF THE KALAELOA LAND BELOW THE UPPER SIDE OF FRONT STREET.

(See Assignment of Errors 5, 6, 8, 12, 20 and 21.)

Let us assume that our third point is not well taken and that the Kalaeloa grant included the portion lying below Front street and running down to low water mark. We next contend that the deed from Kalaeloa to Pitman shows that the defendant-in-error has no title to the portion below Front street for which he is now suing. In this deed the description is, first, of part of the Kalaeloa land by monuments, courses and distances, all of said part lying above Front street. Then follows in a distinct sentence the following clause: "with the

right of extension to low water mark, saving and excepting the necessary width of roadway." The roadway excepted was Front street. The language of this instrument shows clearly that two distinct rights of the grantor, different in their nature, were intended to be passed thereby. First, a fee simple right to the portion described by metes and bounds; second, an easement, license or some other form of incorporeal right in the portion below Front street. Just what this latter right is is not clear from the language in the deed. That it was intended, however, to be a right less than a fee and an incorporeal right is clear from the distinction made by the language of the deed itself. It is a matter of more or less conjecture as to what the phrase "right of extension" means. It may mean a right-of-way or the right to use the strip for drawing up boats. At any rate, the right was different in its nature from the right to the portion above the street, for had it been designed to convey the fee simple of the entire piece, the grantor, assuming that he had that right to convey, would obviously have made the bounds run specifically to low water mark as being the easiest and most natural way to carry out that purpose.

The Circuit Judge overruled our contention and held that the deed carried to Pitman a fee in the land below Front street down to low water mark, giving to the jury the following instruction:

> "I instruct you that the words 'with the right of extension to low water mark' used in the deed from Kalaeloa to Pitman, together with the other particular descriptions contained in said deed covers the land described in Schedule 'B'." (Plaintiff's instruction No. 3.)

This instruction was held correct by the Supreme Court.

V.

THE ACCRETIONS IN FRONT OF THE BATES LAND WERE INCORRECTLY APPORTIONED BY THE JURY, THE JURY DISREGARDING THE INSTRUCTIONS OF THE CIRCUIT JUDGE ON THIS POINT.

(See Assignment of Errors 14, 23 and 24.)

The facts as to the accretions in front of the Bates land which plaintiffs-in-error claim the jury apportioned erroneously are

as follows: (Transcript printed page 124.) The general contour of the shore on Hilo Bay on which the Bates land fronts is a slight concave curve. At the North end of the Bates land there is a slight projection or tongue of rock extending at right angles to the shore several hundred feet into the bay and tapering or narrowing towards its outer end at which there is a small wharf. Along this projection Waianuenue street extends to the wharf after crossing Front street. As accretions formed in front of the Bates land they naturally extended out along the south side of this rock projection and naturally extended out further along the projection than they did at the other end of the Bates land, the new shore line making a curve outward toward the projection. The projection was government land owned in fee simple as a street. "The ownership of all public highways and the land, real estate and property of the same shall be in the Territory of Hawaii in fee simple." Revised Laws of Hawaii, Sec. 593. The defendant-in-error claimed, and the jury awarded to him, all of the accretions in front of the Bates land, instead of apportioning part to the government projection according to the instruction of the court, thereby cutting off the government from its sea frontage along the projection. In other words, he extended his line straight down along Waianuenue street so as to shut the greater portion of said street off from access to the sea.

The proper rule for the apportionment of these accretions was given by the trial court as follows:

> "If you find that any of the property sought to be recovered in this case consists of accretions to land to which the plaintiff has shown title, then the plaintiff is entitled to his portion or share of said accretions according to the following rule: The new shore line should be divided into parts proportionate to the frontage of the riparian proprietors on the ancient shore line and division lines should then be drawn from the old division points to the new." (Defendants' instruction No. 17.)

This is clearly the law.

1 Enc. of Law, 477;

Johnston v. Jones, 1 Black (U. S.), 209, 222;

Deerfield v. Ames, 17 Pick. 41.

Whether good law or not it is the law of this case, having been given to the jury by the trial judge. Nevertheless the jury entirely disregarded this instruction and gave the plaintiff the entire accretions sued for, thereby cutting the government off from fifty to seventy-five feet of sea frontage, which according to the plaintiff's own maps and the undisputed evidence, it possessed at the time of the original deed from Kamehameha III. The fact that this portion of the premises belonged to the Government and not to defendants, of course, makes no difference. The jury was instructed upon this point as follows:

> "In this action of ejectment the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's. If the defendants show the title to any of the land sued for to be in themselves or in some third person or in the Government, in any of these cases the plaintiff cannot recover such lands. (Defendants' instruction No. 1.)

Citations in support of the correctness of this proposition would be superfluous.

VI.

THE TRIAL COURT SHOULD NOT HAVE REQUIRED *CLEAR* PROOF OF ADVERSE POSSESSION.

(See Assignment of Errors 7.)

The following instruction on this point was given by the Circuit Court:

> "I charge you that the defendants in this case rely for one defense upon adverse possession. The burden of proving this defense is upon defendants; unless you are satisfied by a preponderance of the evidence that the defendants have *clearly* proven adverse possession as defined in these instructions, you will find against defendants upon that point." (Plaintiff's instruction No. 6.)

The objection to this instruction raised before the trial judge and now insisted upon, is the use of the word "clearly." We claim that the rule of evidence in civil cases is well established and should not be disturbed. We admit that the burden of proof was upon us to prove adverse possession by a preponderance of the evidence, but that this should result in

clear proof before the jury should be satisfied, is not required by any rule of law.

Jones vs. Hughes, 16 Atl. 849 (Pa.);

Grim v. Murphy, 110 Ill., 271, 276.

See also

Warvelle on Ejectment, p. 258.

"(This instruction) is vicious in another respect. It is not the law that adverse possession can be proved only by clear and positive evidence, as it may be proved by any legitimate testimony. That fact may be proved by a mere preponderance, like any other issue. This instruction was fatally erroneous and should not have been given."

Grim v. Murphy, supra.

VII.

THE REMARKS OF THE TRIAL JUDGE ON THE ARGUMENT OF THE MOTION FOR A DIRECTED VERDICT BY THE PLAINTIFF, NOW THE DEFEND-AND-IN-ERROR, THAT IF THE JURY SHOULD RENDER A VERDICT FOR THE DEFENDANTS, AND A MOTION TO SET ASIDE THE VERDICT SHOULD BE MADE, HE MIGHT GRANT IT, TOGETHER WITH THE PUBLICATION OF ACCOUNTS OF SAID REMARKS IN THE NEWSPAPERS, AND THE READING OF SAID NEWSPAPERS BY THE JURY IN THE JURY ROOM DURING THEIR FINAL DELIBERATION CONSTITUTE GOOD GROUND FOR A NEW TRIAL.

(See Assignment of Errors 17 and 30.)

The motion for a new trial by defendants, now plaintiffs-in-error, was based not only on the ground that the verdict was contrary to the law and the evidence, but also on affidavits showing misconduct on the part of the jury.

The contention as to the misconduct of the jury is based on the following facts as shown by the affidavits filed in support of and against the motion for a new trial and the statement of the trial judge in overruling the motion. (See transcript printed page 129.) At the close of the evidence the plaintiff

moved for a directed verdict and the jury was excused during says, in order to explain why he stopped the movant and at the argument of that motion. After some argument in support of the motion the judge stopped the argument and, as he the same time decided against him, and being under the impression that there was no one present who would be likely to report him, made the statement now in question, to-wit, that he was in favor of the plaintiff but did not want to grant the motion as there was still some doubt in his mind and that if the jury should render a verdict for the defendants and a motion to set aside the verdict was made, he might grant it. Upon the return of the jury one of the defendants' counsel addressed the jury and when within a few minutes of the end of his allotted time asked for an adjournment with the privilege of taking the remainder of his time the following morning. Shortly before the bailiff had called the attention of the judge to the following article in that day's Evening Bulletin, a newspaper of general circulation:

"Favors Plaintiff in Case of Brown-Spreckels.

> "The long-drawn suit of Brown vs. Spreckels, wherein the plaintiff sues for the possession of a valuable piece of land on the Hilo water-front, will finally go to the jury today, the indications being decidedly in favor of the plaintiff. This was shown by a statement made by Judge De Bolt when he gave his ruling on a motion for a directed verdict in favor of the plaintiff.
>
> "Judge De Bolt said that he was inclined in favor of the plaintiff, but did not want to grant the motion for a directed verdict, as there was still some doubt in his mind. He might say, however, that should the jury render a verdict for the defendant and should a motion to set aside that verdict be made, he might do so."

Immediately upon counsel's taking his seat the Judge proceeded to admonish the jurors as he usually did upon their separation and further to instruct them not to read the papers, but had proceeded no further when the same counsel arose and said in substance that he presumed the Court referred to the article in the Evening Bulletin and that he thought such caution was useless and was willing to take his chances. Whereupon the Judge withdrew that part of the instruction to the jury.

On the following morning the following article appeared in the Pacific Commercial Advertiser, the only morning paper published in Honolulu:

"LONG TRIAL NOW ENDING. JUDGE DE BOLT LEANS TO PLAINTIFF—KINNEY'S ARGUMENT.

"Today, the fourth day of the fourth week of trial, the Hilo waterfront case—C. A. Brown against John D. Spreckels and others—will go to the jury for a verdict. W. A. Kinney took about four hours yesterday afternoon in closing for defendants. J. A. Magoon will begin the address for plaintiff at 9 o'clock this morning.

"Judge De Bolt dispensed with noon recess to hear a motion by plaintiff for a directed verdict in his favor. His denial of the motion was thus reported by an afternoon paper:

" 'Judge De Bolt said that he was inclined in favor of the plaintiff, but did not want to grant the motion for a directed verdict, as there was still some doubt in his mind. He might say, however, that should the jury render a verdict for the defendant and should a motion to set aside that verdict be made, he might do so.'

"As such motions are argued and decided in the absence of the jury, an Advertiser reporter asked Judge De Bolt after adjournment if he desired to say anything on the matter.

"In reply he stated that he did make such an intimation of his view of the case to the attorneys. He did it entirely to save their time in arguing on the motion, but was not aware that any member of the press was present when he made the remarks."

(Transcript printed pages 21 and 130.)

Every effort was made by the Court and counsel on both sides to minimize the effect of these unfortunate publications. The jury was instructed repeatedly to disregard them entirely. (Transcript printed page 57.)

In the jury room, however, the matter was mentioned, and, upon some of the jurors stating that they had read the publication in the newspapers and others that they had not, one of the jurors produced a paper—according to affiant's recollection, the

Advertiser—and read the report of the Judge's remarks aloud. The statements of the presiding judge were thus brought before the jury at the most critical stage of the trial and were impressed upon them forcibly by being read directly from the paper, rather than merely reported by some one from recollection.

Our contention on this point is emphatically supported by the authorities. It is not based on any technical rule of law, but on the universally recognized, almost overpowering influence of the Judge in a fairly close case.

Any expression by the Judge of his opinion on a material fact in the hearing of the jury is error and entitles the party prejudiced thereby to a new trial under an Hawaiian statute.

"JURY EXCLUSIVE JUDGES OF FACTS.

> The jury shall in all cases be the exclusive judges of the facts in suits tried before them, and the Judge presiding at any jury trial (hereafter in this chapter named the court), shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause; provided, however, that nothing herein shall be construed to prohibit the court from charging the jury whether there is or is not evidence (indicating the evidence), tending to establish or to rebut any specific fact involved in the cause, nor shall it be construed to prohibit the setting aside of a verdict rendered by such jury, in a proper case, as being against the weight of evidence, and the granting of a new trial therein."

Revised Laws of Hawaii, Sec. 1798;

Lyman v. Hilo Tribune, 13 Haw., 453, 455;

McMinn v. Whelan, 27 Cal., 300, 320;

Neill v. Rogers Bros. Prod. Co., 18 S. E., 563, 564 (W. Va.);

1 Thompson on Trials, Sects. 218 and 219;

21 Enc. of Pleading and Practice, 994.

"This instruction was first given and then subsequently withdrawn. The Court in withdrawing it,

said: 'Well, that instruction ought not to have been given. There is nothing in the article that says he sold it. There is nothing in the transaction that he sold it.' The record shows that the trial judge, in passing on the bill of exceptions, explained that these remarks were not addressed to the jury and should not be considered as a part of the charge. The statements, however, were made in the presence and hearing of the jury. They were comments upon a question of fact which it was in the province of the jury alone to determine, to-wit, what was the meaning of the alleged libellous words. See *13 Am. & Eng. Encycl. Law*, 379; *Odgers, Libel and Slander*, 93; *Newell, Defamation, Slander and Libel*, 290. The jury may well have placed great weight upon and been influenced by the construction given by the court to the language; and if it was so influenced, it must have been to plaintiff's detriment, for the Judge's construction was adverse to plaintiff's case. The alleged libellous words were at least capable of the construction contended for by the plaintiff, and the question should have been submitted to the jury without any indication of the Judge's views in the matter. See Sec. 1, Chap, 56, Laws of 1892."

(Civil Case) *Lyman v. Hilo Tribune, supra.*

"The Judge stated that the witness was one of the most respectable women in his neighborhood. To this remark the defendants' counsel excepted, when the judge further stated that he did not mean to say that she was one of the most respectable, but a woman of respectability. The defendants complain of the conduct of the Judge in this particular as an irregularity of sufficient magnitude to authorize reversal of the judgment.

"From the high and authoritative position of a Judge presiding at a trial before a jury his influence with them is of vast extent and he has it in his power by words and actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same in the estimation of the jury; and thus his personal and offi-

cial influence is exerted to the unfair advantage of one of the parties with a corresponding detriment to the cause of the other. We regret the necessity of an expression of our disapproval of the irregularity of which complaint is made, and though we do not impune the expression as designed to aid the side of the plaintiff, we may say we should not hesitate to reverse the judgment because of it if the same depended in any material degree upon the testimony of the witness whose character and standing was thus endorsed; but as it is, the testimony of Johanna Maume may be obliterated and then the fact sought to be proved by her is established by the testimony of several other witnesses of the plaintiff without any attempt on the part of the defendants to disprove it; beside which such fact was virtually conceded by the defendants."

(Civil Case) *McMinn v. Whelan, supra.*

"The opinion of the Court as to the weight, effect or sufficiency of the evidence submitted to the jury is a good ground for reversal of a judgment according to all the authorities."

Quotation from *McDowell's Executor v. Crawford,* 11 Grat. 377;

Neill v. Rogers Bros. Prod. Co., supra.

"Undoubtedly, the remarks of the presiding judge made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for a reversal of the judgment."

1 Thompson on Trials, Sec. 218.

It is immaterial that the prejudicial remarks are not embodied in the instructions since they have substantially the same effect upon the jury as if they were so given.

Lyman v. Hilo Tribune, 13 Haw., 453, 455;

Neill v. Rogers Bros. Prod. Co., 18 S. E., 563, 564 (West Va.);

Iowa v. Philpot, 97 Ia., 365, 371;

21 Enc. of Pleading & Practice, 995;

1 Thompson on Trials, Sec. 219.

It is obvious from the nature of the error that the court cannot cure it by instructing the jury that they are the sole judges of the facts and must disregard his remarks.

Neill v. Rogers Bros. Prod. Co., 18 S. E., 563, 565 (West Va.);
State v. Harkin, 7 Nev. 377, 383;
Lyman v. Hilo Tribune, 13 Haw., 453, 455;
1 Blashfield's Instructions to Juries, Sec. 49.

"The authorities agree in holding that the court cannot cure inconsiderate remarks of this character by any statement he may make to the jury because of 'their proneness to ascertain the opinion of the judge and to shift their responsibility from themselves to the court'..... The judge had expressed his opinion; the jury heard it and nothing could eliminate it from their minds."

Neill v. Rogers Bros. Prod. Co., supra.

"The error, if curable, was not cured by the remarks made at the close of the testimony. At best, they left the matter where it was before. There was no retraction of the opinion that the testimony tending to prove the two facts referred to was equiponderant; but merely a disclaimer as to the absolute weight of such testimony. As we held in *State v. Ah Tong*, 7 Nev. 148, the express treatment that the whole matter was for the jury to pass upon was insufficient to obviate the effect of the opinion previously expressed."

State v. Harkin, supra.

Unless counsel for defendants had waived their rights in the matter there can be no doubt that this misconduct of the jury was sufficient to require the court to order a new trial. The articles were mischievous in the extreme; not only did the publication in the Bulletin and in the Advertiser state the leaning of the judge in the matter, which, as it is well recognized, impresses the jury considerably, but it also contains the distinct statement that should the jury render a verdict for the defendant and should a motion to set aside that verdict be made, he, the judge, might do so; in other words that he was prepared to enforce his opinion if necessary against that of

the jury. This is an entirely distinct proposition from the debatable question whether in spite of the prohibition of the Hawaiian statute, a judge has the right to comment on the character and credibility of the evidence. No judge under pretext of such a right, would be allowed to state to the jury that he was inclined in favor of the plaintiff and that if the jury should bring in a contrary verdict he would probably set it aside. This would be a distinct threat and an encroachment on the rights of the jury which could not be tolerated, and the publication in question, though not intended to reach the ears of the jury, did in fact reach them, and must have had precisely the same effect.

> "Those courts which uphold the right of the judge to comment upon the evidence and express his opinion to the jury upon the facts, are careful to distinguish between the direction of the judge as to the law of the case and his advice to the jury as to the facts.....The duty of the judge in summing up the evidence and instructing the jury was well summarized by Chief Justice Parker of Massachusetts in the celebrated case of Selfridge. 'I hold the privilege of the jury to ascertain the facts and that of the court to declare the law to be distinct and independent. Should I interfere with my opinion on the testimony in order to influence your minds to incline either way, I should certainly step out of the province of a judge into that of an advocate. All which I conceive necessary or proper for one to do in this part of the cause is to call your attention to points of fact on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove those points, give you some rules by which you are to weigh testimony if a contrariety shall have occurred, and leave you to form a decision according to your best judgment, without giving you to understand if it can be avoided what my opinion of the subject is."
>
> *2 Thompson on Trials,* Sec. 2304.

It will be observed that the article in the Advertiser next morning was far more dangerous than the first publication. After quoting the evening paper in extenso, it contained an interview with the judge in which the judge admitted the truth

of the report in the evening paper, thereby removing any doubt as to its authenticity or correctness. The reading of such publication in the jury room was undoubtedly such misconduct as would vitiate the verdict and require a new trial.

Mattox v. United States, 146 U. S., 140, 150;
(Civil Case) *Morse v. Montana Ore-Purchasing Co.,* 105 Fed., 337, 346;
People v. Stokes, 103 Cal., 193, 196-199;
17 Enc. of Law, 1248.

"The text books refer to many cases in which the action of the officer having a jury in charge, when prejudice might have resulted; or unauthorized communications having a tendency to adverse influence; or the reading of newspapers containing imperfect reports of the trial, or objectionable matter in the form of editorial comments or otherwise, have been held fatal to verdicts.

"The jury in the case before us retired to consider of their verdict on the seventh of October, and had not agreed on the morning of the eighth, when the newspaper article was read to them. It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before; that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, could have no other tendency."

Mattox v. United States, 146 U. S., 140, 150.

The only possible question is the alleged waiver on the part of counsel for defendants. His remarks were made when the Bulletin article only had been published. We submit that if they are a waiver, then they are a waiver of that article alone, or at most of what might be reasonably expected to be published by the morning paper. It was beyond the bounds of reasonable expectation that the morning paper should contain not only the objectionable article in full, but also an interview with the pre-

siding Judge, admitting without reserve, the correctness of the report. We submit also that the waiver did not extend to any proceedings taken in the jury room when the jury were together as a unit performing their sworn duty of deliberating upon the evidence. There is a good deal of difference between the defendants being willing to take their chances upon individual jurors reading the publication in the Evening Bulletin, during an adjournment, and forming their own opinions as to its correctness and effect, at a time when they are forbidden to discuss the case with each other, and on the other hand the Advertiser article, with its additional certificate of authenticity from the Judge himself, being read to the jury while discussing and deliberating in the jury room upon the statement of some of the jurors that they had not previously read it and after they had been repeatedly instructed to disregard the matter entirely. Counsel on both sides had requested and the judge had admonished and instructed the jury upon this point (see opinion of Trial Judge in overruling Motion for New Trial, Transcript printed page 57) and it certainly cannot be contended that the previous waiver survived all these warnings, and cured the subsequent misconduct in the jury room.

Had the jury heeded these repeated warnings and done its duty, it might well be held (provided our waiver shold be held to extend to the corroborative statement of the judge in the morning paper) that we had no cause of complaint as to the effect of the remarks on the individual minds of such of the jurors as had read them. But the jury's absolute disregard of the warnings and disobedience of the express instructions not only justified counsel's view of the night before that all warnings would be useless, but became, new active misconduct entirely beyond the contemplation or scope of the waiver.

The Supreme Court of the Territory in discussing this question of the misconduct of the jury and the alleged waiver by one of the counsel for the defendants, says that the said counsel

> "expressly stated that the jurors might read the papers.....the morning as well as the evening paper and that they were willing to take their chances."

(Transcript printed page 132.)

This statement we submit is inaccurate. The affidavits show that the said waiver of the said counsel referred to the afternoon paper, the statement in which was being discussed at that time. (Transcript printed pages 21 and 28.)

This mistake by the Supreme Court is vitally important since the court based its ruling on this question largely on the fact of the waiver as to all newspapers which they mistakingly assumed had been made.

There are other statements made by the Supreme Court in its discussion of this question, which we respectfully submit are in the nature of unfounded supposition rather than fair statements of the facts, such as the inference that the jurors "must all have known the gist" of the articles both in the morning and afternoon papers before the former article was read to them in the jury room. (Transcript printed page 133.)

VIII.

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IN EVIDENCE ON MOTION FOR A NEW TRIAL THE REPLY AFFIDAVITS OF JURORS AS TO THE EFFECT ON THEIR MINDS OF THE READING OF THE ARTICLE IN THE MORNING PAPER IN THE JURY ROOM.

(See Assignment of Errors 15.)

In connection with the defendants' motion for a new trial the defendants filed the affidavit of one of the jurors that the article in the Advertiser had in fact been read by one of the jurors in the jury room. In reply to this the plaintiff procured affidavits from each of the jurors substantially to the effect that the reading of the article had no effect on the juror, but that he decided the case according to the law and the evidence. These affidavits were admitted and considered by the Court over the objection and exception of the defendants. (Assignment of Errors No. 15.)

We submit that this constitutes reversible error. The affidavit filed for the defendants as to the *fact* that the newspaper was read is admissible, but any affidavits as to the effect of such reading on the minds of the jurors are clearly inadmissible.

Mattox v. United States, 146 U. S., 140, 147, 148-149;

United States v. Ogden, 105 Fed., 371, 373;

Morse v. Montana Ore-Purchasing Co., 105 Fed., 337, 345;

People v. Stokes, 103 Cal., 193, 196-197;

Woodward v. Leavitt, 107 Mass., 453, 460-461, 462, 466;

Wright v. Telegraph Co., 20 Ia., 195, 210;

Hix v. Drury, 5 Pick. (Mass.) 296, 302.

The Supreme Court of the United States has expressly declared in favor of this distinction in deciding whether certain affidavits of jurors were admissible.

> "It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one and read from the other. . . . . There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.
>
> "This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry v. Bailey,* 12 Kansas, 539, 545: 'Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury and not alone within the personal consciousness of one.'
>
> "The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Massachusetts, in *Woodward v. Leavitt,* 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced, 'that on a motion for a new trial on the ground of bias on the part

of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach *or to support* the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind'—.——We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority."

Mattox v. United States, supra.

It will be observed that the decision of Mr. Justice Gray quoted at length with approval was given in a civil case. It should be noted also that this case as well as many of those quoted in accord makes no distinction between affidavits offered to impeach and those offered to support the verdict. This Supreme Court decision has been repeatedly followed in the Federal Courts.

"Objection to their testimony was made by the Government on the well known ground that jurors are ordinarily not permitted to impeach their own verdict. But there is no doubt of their competency to testify to the mere fact of having read or seen the newspaper, although they could not be permitted to testify that the article had or had not influenced their minds. This is an inference which the court is to draw in each particular case, and it will be a more or less probable inference according to the character of the comments complained of."

United States v. Ogden, supra.

"Some of the jurors acknowledge in their affidavits that they read some of these articles, but deny that they were influenced by them, and one states he considered them as advertisements. The fact as to whether or not the jurors read these articles could be established by their affidavits, but as to what influence these articles had upon their action as jurors could not be so established."

Morse v. Montana Ore-Purchasing Co., supra.

"Questions of the competency of such evidence have usually arisen upon its being offered with a view to overturn the verdict; for the party in whose favor the

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verdict has been rendered has ordinarily no need of further proof; but the decisive reasons for excluding the testimony of the jurors to the motives and influences which affected their deliberation are equally strong whether the evidence is offered to impeach or to support the verdict."

Woodward v. Leavitt, supra.

The affidavits in question are a good illustration of the reason for this rule, for they will be found upon inspection to be identical in language and to be so framed that a juror is either obliged to sign or to admit that he deliberately violated his oath to render a true verdict according to the law and the evidence. The only safe course in such cases is to adhere to the rule that the facts may be established by affidavit, but that the law will presume the mischievous consequences which in all human experience must necessarily follow from the reading of such an article.

The Supreme Court of the Territory concedes that "these affidavits should not have been admitted." (Transcript printed page 134.) It says, however, that "*apparently* the decision was uninfluenced by these affidavits and would have been precisely the same if they had been rejected." (Transcript printed page 134.) The Court fails to point out what there is in the record to warrant this assumption and we submit that this conceded error constitutes good ground for a new trial.

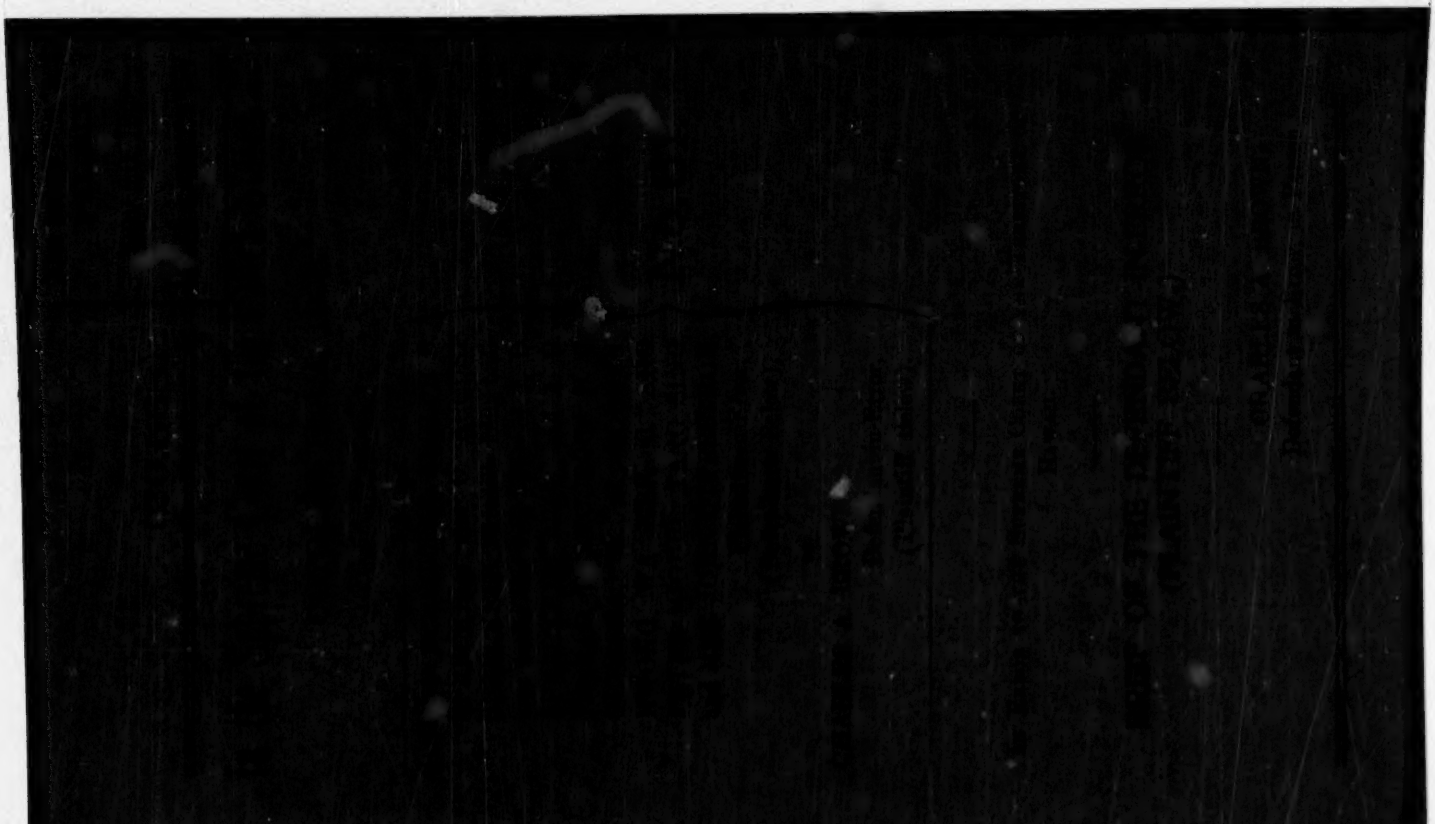
Respectfully submitted,

Moses F. Brown

Robbins B. Anderson.

Attorneys for Plaintiffs-in-Error
(Defendants below).

Honolulu, October 30, A. D. 1908.



(20,668)

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JOHN D. SPRECKELS, ADOLPH B. SPRECKELS and C. AUGUST SPRECKELS, Partners doing business under the firm name of J. D. SPRECKELS' BROS., and A. G. SERRAO, D. LYCURGUS, S. C. GUERERA, W. C. BORDEN, KWONG WA KEE, C. AHO, PETER MIGUEL, TANG SING, and MRS. JOHN UTTERSTROM,
Plaintiffs-in-Error,
(Defendants Below),

vs.

CHARLES A. BROWN,
Defendant-in-Error,
(Plaintiff Below).

BRIEF OF THE DEFENDANT-IN-ERROR (PLAINTIFF BELOW.)

STATEMENT OF THE CASE.

The statement of the case in brief of Plaintiffs, is substantially correct with the exception of the following statement on page 4:

"The jury failed to follow the rule of apportionment of accretions laid down by the trial judge in his instructions and awarded to the Plaintiff all he claimed in his Bill of Complaint, including a portion which would have gone to a third party, namely the Territory of Hawaii, under the rule laid down by the Court."

The Defendant-in-Error contends that the jury did follow the rule of apportionment, but the evidence shows that the rule does not apply. He also claims that the statement with reference to the counter-affidavits found at the bottom of page 4 of the brief is misleading in that it states that "The Plaintiff filed counter-affidavits of the jurors stating that they had not been influenced by the statement of the Judge as read in the papers." While this statement is correct so far as it goes, the affidavits themselves (Tr. 41-48) will show that there are several allegations of fact contained in them which it is contended would make it proper for them to be considered upon the motion of Defendants below for a new trial.

ARGUMENT ON SPECIFICATIONS OF ERROR.

I.

"THE DEED OF RELEASE COVERING BOTH THE TWO PIECES OF LAND IN QUESTION FROM MARTHA B. PITMAN TO CHARLES A. BROWN, THE PLAINTIFF, CONVEYED NO TITLE TO THE LATTER."

Assignments of Error 1, 2, 6, 10, 13, 14, 16, 18, 19.

The Supreme Court discusses these Assignments in transcript page 120. It will appear by the inspection of the certificate of acknowledgment of this deed (Tr. 82) that it was executed by Martha B. Pitman in the Commonwealth of Massachusetts. Prior to 1891, the alleged common law doctrine, statute 32, Henry VIII., C. 28, that a disseisee could not convey title, was recognized as the law in Massachusetts, but in that year that rule was changed by the following statute: "A conveyance of land, if otherwise valid, shall notwithstanding disseisin, or adverse possession be as effectual to transfer the title as if the grantor were actually seized and possessed of such land and shall vest in the grantee the right of entry and of action for the recovery of the estate incident to such title." Statute 1891, C. 354 II, Revised Laws of Massachusetts 127, sec. 6.

It is claimed by Plaintiffs that the Martha B. Pitman deed being in the form of a release, cannot be construed as a bargain and sale deed, but this is not the law.

Moelle v. Sherwood, 148 U. S. 21, 37 L. Ed. 351;
Pray v. Pierce, 7 Mass., 381;
Russel v. Coffin, 8 Pick., 143;
McAnaw v. Tiffin, 45 S. W., 656;
Mays v. Libby, 12 Mass., 339;
9 A. & E. Encyl., L. 104.

By statute in Massachusetts, it is provided that, "A deed of quit claim and release shall be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale." 2 Revised Laws of Mass., C. 127, sec. 2.

As this deed of Martha B. Pitman does not violate any statute or rule of conveyance in the Territory of Hawaii, it ought to be upheld in this Territory because of the statutes of Massachusetts, for it may be fairly presumed to have been made in reliance upon that statute and upon the construction placed thereon by the Courts of Massachusetts. Aside from this, however, such a deed has been repeatedly upheld as a bargain and sale deed in Hawaii: *Mossman vs. Hawaiian Govt.,* 10 Haw. 421; *Ninia vs. Wilder,* 12 Haw. 104-118; *Andrews vs. Wahinenui,* 16 Haw. 260. But if these contentions are unsound, the Supreme Court having held in this case that such a deed is good as a bargain and sale deed it is the law of the case and controlling in this Court.

Brine v. Hartford F. Ins. Co., 96 U. S. 627, affirmed in *East Central Eureka Mining Co. v. Central Eureka Mining Co.,* 204 U. S. 266, 51 L. Ed. 476;
State of Montana v. Rice, 204 U. S. 291, 51 L. Ed. 490;
Gatewood v. North Carolina, 203 U. S. 531, 51 L. Ed. 305;
Francis v. Francis, 203 U. S., 51 L. Ed. 165;
Paine v. Willson, 146 F. 488.

It is believed that the rule as laid down by these cases disposes of all the assignments of error relied upon by Plaintiffs-in-Error in this case.

II.

"THE COURT ERRED IN INSTRUCTING THE JURY THAT THE LAND DESCRIBED IN EXHIBIT 'A' (BATES LAND) WAS CONVEYED BY THE WORDS 'SEA BEACH.'"

Assignments of Error 4, 6, 11, 22.

The subject matter of this error is discussed by the Supreme Court at pages 114 and 122 of the transcript. It will be readily seen that it is impossible for this Court to get a proper conception of the physical characteristics of the land in controversy and that adjoining without all the testimony and exhibits filed in the cause. The statements of fact on page 11 of Plaaintiffs' Brief can not be considered as evidence. The Supreme Court may have found certain facts from the record, but that would not be binding on this Court only to the extent of sustaining that Court. Such findings could not be made the basis for reversing that Court.

There is sufficient in the record to at least show a latent ambiguity. It matters not whether the trial judge made a mistake in leaving to the jury certain questions on which they should have been instructed to find for Plaintiff Below. Such an error would not entitle Defendants Below to complain, as they could in no possible way be prejudiced thereby.

It was harmless error. In *"Hattie H. Morrison v. James L. Dickey,* 69 L. R. A. 90," the Court says:

> "While the instructions of the judge are not at all in accord with some of the principles above laid down, still under the undisputed facts of the case the verdict for the Defendants was demanded, and any errors committed in charging the jury were harmless." 69 L. R. A. 87, on page 90.

These assignments should be overruled on the ground that the record does not show in what way the trial judge committed error and this Court can not say that he did commit the errors complained of.

These assignments are predicated upon the evidence. It is clearly established that this court will not consider a question that depends upon the weight of evidence.

Young v. Amy, 171 U. S. 179, 43 L. Ed. 127.

In this case, the court say: "Considering, however, the state of the record and the nature of the findings of fact certified, we can not determine the correctness of the objections to the evidence without going into its weight and making independent conclusions of fact; in other words, without disregarding the findings made by the court below, by which we are concluded."

See also *Harrison v. Perea*, 168 U. S. 311, 42 L. Ed. 478.

The Supreme Court discusses these assignments in transcript page 122, in the following language:

"It is clear * * * that the words 'sea beach' as used in the deed from the King, presumptively mean all the land both above and below high water mark in front of the part described by courses and distances. * * * The function of evidence aliunde would be to overcome this presumption but the evidence adduced instead of overcoming the presumption greatly strengthens it. There is, indeed, no evidence entitled to consideration the other way. It was shown * * * that the area from low water mark to an indefinite distance above the bank or high water mark, at least as far up as the upper side of Front street, was used by the general public for beach purposes, * * * and was commonly known beach or sea beach. * * *

In exceptionally high tide the water washed above the bank and according to some of the testimony at times to the upper side of Front street, up to which, and perhaps further there was more or less sand at that time. The diagram in the Kalaeloa Award and Patent above referred to shows that the word beach was used at that time in that locality as including more or less land above high water mark."

Sufficient does appear in the record to show that the ruling of the Court was correct, that the words, "also the sea beach in front of the same down to low water mark" gave to Elizabeth G. I. Bates the land to low water mark. Taking the record as it stands, the deed from Kamehameha III to Elizabeth G. I. Bates (Tr. 79) conveys a piece of land which cannot be located, except that it is in the vicinity of Waianuenue street and Merchant street. The Court cannot be called upon to work out the location and, indeed, it could not work it out, unless it had fixed for it certain land marks such as the streets, courthouse yard and fence in front, a black wall, and low and high water mark, and the sea beach. Therefore, we must as-

sume that the decision of the Supreme Court is correct, that the land conveyed was one continuous strip from the upper boundary to low water mark. Otherwise the words are meaningless which the Court will not presume was intended.

The phrase, "also the sea beach in front of the same down to low water mark," means what it says, that it is in front of the land granted by metes and bounds and not in front of some other land which the deed gives no clew to the location of. In other words, the phrase, "in front of the same," is a part of the description.

Indeed it would be difficult, if not impossible, to get more apt words to describe this beach. The solid land being surveyed by metes and bounds, and the beach being unsurveyed with no land marks to define it, it would have to be described as "the beach in front of the land conveyed." One might use a great many words and be no more expressive and definite.

III.

"THE LAND COMMISSION AWARD AND ROYAL PATENT TO KALAELOA DID NOT EXTEND BELOW THE UPPER SIDE OF FRONT STREET."

Assignments of Error 6, 8, 20.

The Supreme Court discusses this proposition in transcript pages 112-121. All that was said in discussing assignments of error under heading 2 with reference to the evidence applies equally to this heading.

It is not contended that plaintiff below did not prove a complete paper title to the land in question, provided the description in the deed conveys the land to low water mark. The argument for plaintiff is based upon an entirely incorrect statement of the facts.

On page 15 of the brief they say, "The description by courses and distances and area and by the continuous bounding lines on the diagram bring the line down only to the upper side of Front street which was above high water mark."

Where the line of high water mark was, was a fact to be found by the jury or by the Court, and not to be supplied by counsel. But the misstatement of counsel is with reference to the area and the road. The area is not made up of the land in the enclosed lines alone. This plainly appeared in the testimony, and if the Court would take the trouble to work out the area as given in Royal Patent 1144 (Tr. 87) based

upon Award 4894 (Tr. 45) it would see that although the survey follows the black or closed lines, the area of 2.16 acres is made up by adding to that area the area included in the dotted lines as beach. In other words, the area within the closed lines, taken together with the area in the dotted lines designated as beach, makes the total area 2.16 acres in the Royal Patent or Award.

The road is included within the black or closed lines and not as stated under heading three of page 15 of brief wherein it is said, "The Land Commission Award and Royal Patent to Kalaeloa did not extend below the upper side of Front street." This mistake arose, in all probability, from the opinion of the Court (Tr. 121) wherein it is said: "The description of the lower boundary of the land in the patent, is * * * along the edge or side of the sea. This is ambibuous. It might mean along high water mark or along low water mark. Presumptively it means along high water mark, but the description in the award and patent by courses and distances brings the land down only to the *upper side of Front street* which was above high water mark." This is evidently a mistake as the road was on the bank, if indeed there was any road there at all in those days, and not on the sand. The closed lines probably extended to the edge of what then was and now is known as the earth bank, which would be as far as the survey would naturally go. But whether the road was below this earth bank on the sand or on top of it on the solid ground, makes really no difference. If it was on the bank, it was included in the surveyed portion. If it was below the bank it was not included. But in any event, the area within the enclosed lines in the diagram which may be presumed to have been solid ground, and the area in the dotted lines, on the diagram, which was unquestionably sand beach, must be taken together to make up the area of 2.16 acres given in the Royal Patent.

This should dispose of the contention of Plaintiffs upon these assignments.

There can be no dispute as to the rule contended for by Plaintiffs that if the monuments in a deed appear to have been inserted by mistake so as not to give the correct boundaries of the land intended to be conveyed, they ought to be disregarded; but that is not the case here. It is plain that the sea was intended to be one of the boundaries of this piece of land and the only question is whether or not the boundary was high or low water mark. Where the tide rises as it does in this country

only about two feet, it would, under ordinary circumstances be of little importance whether the line extended to low water mark or not. Without words of description extending the land bordering on the sea to low water mark, it has been intimated in *Halsted vs. Gay*, 7 Haw. 587, at page 589, that private ownership of land in this country does extend to low water mark. The Court in that case used this language: "The intention is clear to grant to the sea, and make it coterminus with it."

In this Kingdom the average rise and fall of the tide is two feet. Where the coast is of rock, high and low water is on the same line. Where it is of sand, the difference between high and low water is generally too little and too ill-defined and shifting to be taken into account.

Section 387 of the Code, page 92, Compiled Laws, seems to imply that the proprietorship of land adjacent to the beach extended to low water mark, for it enacts that the fisheries for a mile from low water mark are the property of the owners of the lands adjacent and appurtenant, thus making the boundary between the land and the fishery to be the low water line."

Where, as in this case, the words of the deed expressly show an intention that the land should extend to low water mark, further discussion seems to be precluded.

IV.

"THE DEED FROM KALAELOA TO PITMAN DID NOT CARRY THE PART OF THE KALAELOA LAND BELOW THE UPPER SIDE OF FRONT STREET."

Assignments of Error 5, 6, 8, 12, 20, 21.

As the deed from Kalaeloa to Pitman is not in the record it is submitted that the Court ought not to consider these assignments. How can this Court construe the deed without having it set out in full?

In any event, if the verdict was wrong as to this portion of the Kalaeloa land, it would not justify the Court in sustaining the writ of error except as to it.

In the excerpt from the deed set out in Plaintiffs' Brief, is this language, "With the right of extension to low water mark, saving and excepting the necessary width of roadway." This reference to the beach is not so clear and specific as the language in the Bates deed, yet it unquestionably means the same thing That is, it would have been clearer to have said

after the described land, "together with the beach in front, extending down to low water mark," or "which include the lands adjoining same to low water mark," or "extending down to low water mark." But it is evident from the language of the deed that Kalealoa intended to convey to Pitman the land which was described by metes and bounds and the sea beach in front of the same down to low water mark. In other words, he intended to convey all the land he acquired under the Royal Patent. He only excepted the necessary width of roadway. That he did not convey.

Here again Plaintiffs' counsel wants to make the words in this deed meaningless. They are not able to give the Court anything tangible as to what the grantor meant by the use of the words, "with right of extension to low water mark."

V.

"THE ACCRETIONS IN FRONT OF THE BATES LAND WERE INCORRECTLY APPORTIONED BY THE JURY, THE JURY DISREGARDING THE INSTRUCTIONS OF THE CIRCUIT JUDGE ON THIS POINT."

Assignments of Error 14, 23, 24.

These assignments are fully discussed by the Supreme Court in the transcript pages 124-5.

Here again the evidence is not before the Court. The trial judge, in all probability, thought that he would be on the safe side and leave the question of apportionment of accretions to the jury so that if they found it was a case in which there should be apportionment of accretions, they could give to the plaintiff below such portion as they should find him to be entitled to. But if the defendant below presented no evidence as to how much of the accretions should go to the adjoining owner, how could the jury find as a matter of fact, that there should be any apportionment of accretions? If, from the evidence, plaintiff below was entitled to all of the accretions and the jury found that he was, this Court is in no position to say that the jury was wrong or that the trial court was wrong.

It will be observed that the Hawaiian Government has not intervened and does not claim any of these accretions.

It is stated in Plaintiffs' Brief, page 21, "The general contour of the shore on Hilo Bay on which the Bates land fronts,

is a slight concave curve. At the north end of the Bates land there is a slight projection or tongue of rock extending at right angles to the shore several hundred feet into the bay and tapering or narrowing towards its outer end at which there is a small wharf." According to Plaintiffs' contention an accidental tongue of rocks projecting out from the shore line 600 feet seawards, would deprive Defendant of practically all his water front. If this be true on one side it would be true on the other and we would have the tongue, instead of coming to a point, widening out to an enormous extent.

VI.

"THE TRIAL COURT SHOULD NOT HAVE REQUIRED *CLEAR* PROOF OF ADVERSE POSSESSION."

Assignment of Error 7.

The instruction of the Court under this assignment of error was a slight modification of the instruction given in *Jackson vs. Berner,* 48 Ill., 203 cited by this Court with approval in *Ward vs. Cochran,* 150 U. S., 604, 37 L. Ed. 1195, in the following language:

"In *Jackson vs. Berner,* 48 Ill., 203, it was held that an adverse possession sufficient to defeat the legal title, where there is no paper title, must be hostile in its inception and is not to be made out by inference but by *clear and positive proof;* and further that the possession must be such as *to show clearly* that the party claims the land as his own, openly and exclusively."

VII.

"THE REMARKS OF THE TRIAL JUDGE ON THE ARGUMENT OF THE MOTION FOR A DIRECTED VERDICT BY THE PLAINTIFF, NOW THE DEFENDANT-IN-ERROR, THAT IF THE JURY SHOULD RENDER A VERDICT FOR THE DEFENDANTS, AND A MOTION TO SET ASIDE THE VERDICT SHOULD BE MADE, HE MIGHT GRANT IT, TOGETHER WITH THE PUBLICATION OF ACCOUNTS OF SAID REMARKS IN THE NEWSPAPERS, AND THE READING OF SAID NEWSPAPERS BY THE JURY IN THE JURY ROOM DURING THEIR FINAL DELIBERATION CONSTITUTE GOOD GROUND FOR A NEW TRIAL."

Assignments of Error 17, 30.

This matter is discussed by the Supreme Court on pages 129-134 of the transscript.

Without admitting that there was any misconduct of the jury and relying upon the proposition that misconduct of the jury is not error which will be reviewed by this Court, it does not appear to be well settled that judges can not in some instances comment upon the evidence. Any Territorial law precluding them from so doing, would not be binding upon this Court and the decision of the Territorial Court as to whether or not such comment was unprejudicial, would control this Court, under its decisions heretofore cited. The Trial Judge (De Bolt) discussed this matter in his decision of the motion of defendants below for a new trial, (Tr. page 54) in which he quotes Mr. Justice Brown of the Supreme Court of the United States upon the subject. (Tr. 60.)

See also 9 Federal Statutes Annotated 343, 4th title, "Comments by the Court on the Evidence," citing *United States vs. 14 Packages of Pins,* (1832), Gilp. (U. S. 235) 25 Fed. Cas. No. 15151.

This Court will look in vain through the statements of Judge De Bolt for any comment upon the evidence by which the jury could be in any way prejudiced, or in reading which statements they could get any clew as to how they should decide any question of fact. It is perfectly apparent from the record, both from Judge De Bolt's decision and the decision of the Supreme Court, that there was no merit in the defence

and that plaintiff was entitled to the land in question, but that the trial Judge, out of excessive caution preferred to have the matter submitted to the jury. His statement was merely his own expression of his views upon the law as shown by the undisputed evidence and had nothing to do with disputed facts.

All of the argument for plaintiffs upon this point is based upon an erroneous conclusion, first, that the Court commented upon the evidence, and secondly, that the jury misconducted itself.

There is no law prohibiting the jury from reading the papers while on jury duty, unless they are confined. There is no law against their having with them newspapers in the jury room if they so desire. In fact, it probably would be better for the jury to have the exact language of what the Court said before them, than to have some one give his recollection of what the article contained. The language of the Trial Judge, taken in connection with his instructions, and the remarks of counsel for plaintiff below could not have any prejudicial effect upon any intelligent, fair-minded man, and there is no suggestion that any of these jurors were not men above reproach or suspicion.

Entirely apart from these considerations, counsel for defendants below is wholly at fault for the article being read by the jury. He took his chances, those were his words, in agreeing that the jury might read the article and he can not now complain. After he found that the verdict was against him, he perhaps regretted the position that he had taken and would gladly have receded from it, and now attempts to restrict the privilege of reading the papers to the Bulletin of that afternoon, excluding the Advertiser of the next morning, containing the statements of his Honor confirmed by him. It does not seem that any weight should be given to this contention. In the first place the jury would have to presume that the article in the Bulletin correctly reported the Judge's remarks, otherwise he would not only have told them not to read the Bulletin, but that the Bulletin contained a misrepresentation of what he had said. The expression of willingness on the part of counsel for defendants below that the jury should read the article was unlimited. It meant that they might read it that afternoon or the next morning or at any time. It would be manifestly unfair to plaintiff below if after the thing was done, without restriction, it should be held to be restricted by reason of the construction that counsel now places upon his intention at the time. He forced the article on the jury and now would make the defendant suffer for it.

"Where by consent of the defendant, the jurors were permitted to attend church in charge of the bailiff it was held no prejudice would be presumed, and that if the discourse might have had a tendancy to prejudice the defendant, he could not complain because of the consent given by him."

State vs. Kent, 5 N. Dak., 516.

"A verdict will not be set aside for misconduct of jurors where the moving party knew all the facts, but remained silent until the verdict was rendered against him."

Consolidated, etc., vs. Trenton, etc., 57 Fed. 898;
Martin vs. Lidwell, 27 Ga. 332;
Valiente vs. Bryan, 66 How. Pr. 302.

"When during the trial, the jurors, by leave of the court, are allowed to go to their homes, and one of them while thus separated has a conversation with an important witness for plaintiff in which the juror asks, and the witness answers many questions about the case, and the latter points out the place of the alleged injury for which the plaintiff sues, such conduct while grossly improper does not require a new trial at the instance of plaintiff when it does not appear that he and counsel were ignorant of the facts until after the trial had ended."

Wynn vs. City, etc., R. 91 Ga. 344; 17 S. E. 649.

The attention of the court is especially directed to the case last cited.

In this connection the remarks are very pertinent in *Moore v. N. Y. El. R. Co.,* 8 N. Y. Supp. 331:

"But as it does not appear that this objection was taken before the judge who heard the motion, we will consider the case upon its merits. The most obvious reason for denying the motion is that the objection that some of the jurymen did not visit the premises was not made upon the trial, and must therefore be deemed to have been waived."

In case there was any irregularity, there were several ways to remedy it open to the counsel of defendants below. One was to proceed with the argument and have the case submitted to the jury that same day. Another was to ask to have the jury confined for the night. Another was to ask the Court to

admonish the jury in the strictest terms not to read the papers. Not having requested any of these things, and inviting them to read the papers, how can plaintiff now complain of the conduct of the jury in that regard?

In *Townsend vs. Kelley,* 5 Atl. 69 at 70, the Court say:

"The motion to set aside the verdict cannot be sustained. It may be that the jurors who examined the horse during the trial were prejudiced by the examination. But the motion does not allege, nor is there proof, that the losing party was not informed of the misconduct of the jurors in season to have made his objection before the cause was committed to the jury. All that the motion alleges may be true, and still the losing party not be aggrieved. Parties who move to set a verdict aside for misconduct of jurors must make it affirmatively appear that no remedy was open to them before verdict rendered. See case of *State v. Bowden,* 71 Me. 89, and cases there cited."

VIII.

"THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN ADMITTING IN EVIDENCE ON MOTION FOR A NEW TRIAL, THE REPLY AFFIDAVITS OF JURORS AS TO THE EFFECT ON THEIR MINDS OF THE READING OF THE ARTICLE IN THE MORNING PAPER IN THE JURY ROOM."

Assignment of Error 15.

In *Moore vs. N. Y. El. R. Co.,* 8 N. Y. Supp. 331, cited above, the Court say:

> "The affidavits of the other seven members of the jury tended to corroborate the affidavits of the first-mentioned jurymen, and to show that the circumstance of the visit to the premises had no effect on the verdict. It can hardly be disputed that the affidavits of jurors are competent to sustain a verdict, although inadmissible to impeach it."

A distinction seems to be made in the decisions in allowing affidavits of jurymen as to what takes place in the jury room, and the stating of the effect which such action has upon the mind of the individual juror; the former being allowed and the latter being disallowed. There seems to be, however, no good reason for this distinction. If what takes place in the

jury room would, of necessity, influence a juror one way or the other, his statement that it had no such effect on his mind would be of no avail. If, however, the juror was conscientious and what took place in the jury room might or might not have any effect upon his mind, his statement that it had no effect should be given great weight. Such a statement in no case, would be conclusive and the court should be allowed to decide upon the merits of each case. In this case, entirely apart from whether or not the court can consider such an assignment of error, and disregarding the fact that plaintiff is entirely to blame for what took place, and should not profit by his own folly, the affidavits were admissible for the facts contained in them. (Tr. 41-47.) The first fact is that the juror was in a frame of mind to have heeded the request of the trial judge not to read the published remarks. The next fact, though stated inferentially, is that W. A. Kinney, who was the attorney for the defendants below, said he had no objection to the jury reading the same. The next fact is that the jurymen understood from the remarks of J. Alfred Magoon, Attorney for plaintiff below, and the Trial Judge, that the jury was not to consider nor be influenced in any way by those remarks. The next fact which is unobjectionable is that the juryman rendered his verdict after a careful consideration of the evidence and the instructions of his Honor. All of these facts are very pertinent and important for the court to know, and were consequently proper facts to be set forth in the affidavit. The objectionable feature being that the juror rendered his verdict impartially and upon the merits without any regard to the remarks of the Trial Judge. To say the least, this is entirely harmless. The affidavit being good in all other respects, should not be disallowed because of this harmless statement.

The Trial Judge refused a new trial. There were many grounds for new trial and it must be presumed that he refused the new trial on each and every ground. One of the grounds was misconduct of the jury. The Judge must have found that there was no misconduct. If he had found there was misconduct he would have had to consider whether or not such misconduct was cured by reason of the fact that the juror stated that he rendered his verdict fairly and impartially and that the misconduct did not effect the verdict in any way. In such a case, if the court had held that it would consider the statement in the affidavit that the juror was not improperly influenced in his verdict, the question would be squarely presented as to whether or not such a finding was prejudicial error. That question in this case does not arise. It would not be per-

mitted to the defendants below to obtain a new trial where the record fully shows that no new trial should have been granted, because of something in an affidavit in opposition to motion for a new trial which should not be contained therein. If the verdict had been for the defendants below and the plaintiff below had filed an affidavit which contained the statement of a juror that his verdict had been effected by what had been done in the jury room and the court had granted the motion for new trial upon that ground, the question might be up for consideration, but it can not be considered in this case.

Apart from all these considerations, the trial court found there was no misconduct. That finding has been sustained by the Supreme Court and under the rule previously cited such finding is conclusive upon this Court.

CONCLUSION.

An inspection of this record will disclose the fact that the verdict was by twelve citizens of this community who, so far as the record goes, are above reproach. It was rendered after a very exhaustive hearing on all the facts and after many trials and litigation extending over six years. It appears on its face, to be an honest and fair verdict and no injustice whatever has been done the defendants. It is the policy of the law, in such cases, to end litigation and to save the community as well as the parties, further expense.

It is respectfully submitted that the Trial Judge should have directed a verdict for plaintiff, but having refused to do so, it should unquestionably stand and the writ of error should be dismissed.

Respectfully submitted,

Charles A. Brown

Defendant-in-Error in Person.

Dated at Honolulu, T. H., this 6th day of November, 1908.

Service of a copy of this brief is hereby admitted at Honolulu this 6th day of November, 1908.

(sgd.) Mason & Rosa

" Robbins & Anderson

Attorneys for Plaintiffs-in-Error.